

**PROFESSIONAL SPORT
IN THE
INTERNAL MARKET**

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Executive summary

Sport is unlike any other business. At one level it performs educational, public health, social, cultural and recreational functions. At another level, sport is big business capable of generating considerable revenues. Sport also operates under different market conditions to other industries with competitors (clubs) having a vested interest in the strength and survival of their rivals. This uniqueness has contributed to the construction of an organisational model described as the 'European model of sport' endowed with a rule book designed to protect the 'specificity' of sport. Many of these rules would not be considered appropriate in 'normal' industries and would be subject to legal challenge because they inhibit the development of a level playing field either through restricting the free movement of workers or by placing undue market restrictions on the commercial freedom of undertakings. These concerns have now emerged in sport, particularly as players, clubs and governing bodies increasingly carry out significant economic activities. This has contributed to a growing number of sporting complaints being brought before the EU.

A review of the settled case law of the European Court of Justice and the Competition Policy Directorate General reveals an emerging approach to sport. This is based on the location of disputed sporting rules within one of three categories:

1. In the first category are sporting rules or practices which fall outside the scope of the EC Treaty's free movement and competition law provisions. These rules or practices are either of sporting interest only (an increasingly impossible judgement to make) or they are deemed to be rules which are essential for the proper functioning and organisation of sport. Such rules include; nationality restrictions in the composition of national team sports, rules relating to selection criteria, sanctions for doping offences in sport, rules preventing club relocation, rules preventing multiple club ownership and the granting of educational state aid to sports clubs.
2. In the second category are sporting rules or practices which are economic in nature and which do constitute restrictions and are thus subject to the EC Treaty's free movement and competition law provisions. However, such rules or practices will not be prohibited by the Treaty should the rules in question be necessary for the proper functioning and organisation of sport. The EU has thus far considered the maintenance of competitive balance in sport, the preservation of the integrity of sport, encouraging the education and training of young players and the protection of national team sports as being legitimate objectives. Consequently, a range of sporting rules have been deemed to be compatible with the Treaty including; the use of transfer windows, the collective sale of broadcasting rights, collective purchasing agreements for broadcasting rights, restrictions on the cross border transmission of sport, ticketing arrangements, in-contract transfer payments and rules regulating players' agents.
3. In the third category are sporting rules or practices which do constitute restrictions and are prohibited by the EC Treaty's free movement and competition law provisions. Such rules include; nationality restrictions in the composition of club sport, out-of-contract transfer payments, nationality rules in breach of non-discrimination provisions contained in Association Agreements, periods of long exclusivity for sports rights, export bans for sports goods and regulatory rules designed to maintain commercial dominance.

The above settled case law has considerably clarified the legal environment in which sport operates. There are however a number of unresolved issues that may require further adjudication by the EU. Many of these issues relate to UEFA's regulation of football. Rules on home-grown players, player release clauses and rules which seek to tie clubs to national territorial locations are questionable. Whilst it must be accepted that UEFA has a legitimate right to seek to maintain competitive balance in sport, to preserve the integrity of sport, encourage the education and training of young players and protect national team sports, it is submitted that more appropriate and less restrictive means of achieving these objectives are available to UEFA.

At the root of many such disputes is the issue of allowing appropriate levels of participation by those affected by the rules. To avoid litigation sports governing bodies should ensure their constitutions and procedures are transparent and allow for the democratic involvement of all stakeholders. This can help resolve disputes such as the one witnessed over player release clauses. On a wider theme, it is clear that a properly structured social dialogue between representatives of labour and management (players and clubs), supported by UEFA could create a wider consensus amongst the stakeholders, particularly in relation to employment matters.

Therefore the issue at stake is not so much the creation of a perfectly level playing field for sport as this may not be appropriate in all cases. Rather the rules of sporting bodies which contradict the basic principles of EC law should be carefully scrutinised to see whether they are transparently and democratically agreed and truly necessary and proportionate for the achievement of the legitimate objectives they seek to pursue. Given the complexities of these arguments, these judgements can only be made on a case by case basis.

1 Introduction¹

1.1 General purpose of the study

From the Study Specification follows that the Study concerns the question how Community law affects professional sport, in particular with regard to the internal market and related competition issues. In particular the Study should present the existing legal and economic knowledge concerning the internal market for sport and related competition issues. (paragraph 2 of the Study Specification) The study should identify the rules applicable to the internal market of professional sports in Europe. It is necessary to identify under what conditions and to what extent EU law is applicable to professional sports in the internal market. A description of the EC rules applicable to professional sport clubs and players in the EU is accordingly required. The study should describe the existing situation of professional sport in the internal market in order to determine whether a level playing field exists or whether, conversely, there are conflicts that justify policy options and recommendations. The emphasis of the Study is on football. (paragraph 3 of the Study Specification) The Study should try to describe and develop guidelines and proposals – including specific and concrete policy recommendations and options. Analysing the desirability for possible policy intervention is an essential element of this study (paragraph 4 of the Study Specification).

1.2 Detailed research questions

In the Study Specification (paragraph 3) it is indicated on which issues the Study should focus in particular in this context, that is:

- a legal and economic definition of the sport internal market;
- free movement of professional sports players and the free provision of services by professional sports entities, such as clubs; also: nationality clauses, transfer fees at the end of the contract, work permits, the use of fixed term contracts; the right for sports clubs to settle in another Member State and to participate in the leagues of both home and host State;
- the clarification of the existing legal framework of professional sports, professional football in particular;
- competition issues: State Aid to professional football clubs, the position of UEFA, joint selling of broadcasting rights, multiple ownership of clubs, formats and participation in competitions, creation of new competitions, transfer system, licensing systems for professional football clubs.

¹ Bibliography:

- Richard Arrish, "Sports Law and Policy in the European Union", Manchester University Press, 2003;
- Lars Halgreen, "European Sports Law – A comparative Analysis of the European and American Models of Sports", Copenhagen 2004.
- "The European Union and Sport: Legal and Policy Documents", Robert C.R. Siekmann and Janwillem Soek (eds), T.M.C. Asser Instituut, The Hague 2005.
- Stephen Dobson and John Goddard, The Economics of Football, Cambridge University Press, 2001.

1.3 Research method

First, we will present the relevant legal and economic framework for the study. This concise framework is the backbone of the study. It includes:

- A short introduction on the EU's current law and policy position with regard to sport in general and professional sport in particular (see Chapter 2.1 and 2.2);
- A short description of the international, regional (Europe) and national legal framework of professional sport, and football in particular (see Chapter 2.3);
- A short description of the European sport market model, and of the economic dynamics of the sports markets, in particular the football market (see Chapter 3).
- Second, we will identify EU rules pertinent to the international framework of professional sport, and football in particular, and how they affect professional sport, and football in particular, concerning the following sporting issues (hereafter in alphabetical order) (see Chapter 4):

- Broadcasting rights
- Competitions
- Diploma's
- Doping
- Fixed term contracts
- Licensing
- Multiple ownership of clubs
- Nationality clauses
- Players' agents
- Relocation
- Social Dialogue
- State aid
- Ticketing
- Trade mark
- Transfers
- Vandalism and violence
- Work permits.

N.B. Other possibly relevant issues which have not yet been the object of legal scrutiny in particular by the Commission and/or the European Court of Justice, may be added in the course of research.

We will analyse all possibly relevant issues and determine which legal aspects they reflect and how these aspects have to be qualified in legal terms (free movement, state aid, etcetera). For example: from a legal perspective, 'broadcasting rights' includes aspects such as 'collective selling' (competition law) and the 'Television without Frontiers' Directive'. For each issue we will also identify the relevant stakeholders (associations, leagues, clubs, players, consumers etc.).

In detail, the research method ("steps" to be taken) will be as follows as to the identification issue:

What are the issues that are relevant to be tested under European law?

NB: All possible issues first have to be considered more deeply as to their (mutual) relevance in the context of this study. Whom do they each (mainly) concern: state, association, league, club, and/or players etc.? They then will be grouped accordingly for the purposes of the Study's Final Report (for example, a distinction possibly could be made between "clubs" issues (cf., State aid) and "players" issues (cf., transfers) etc.; another category of stakeholders, for example, could be consumer issues (cf., ticketing).

What sports rules are applicable to each of these issues?

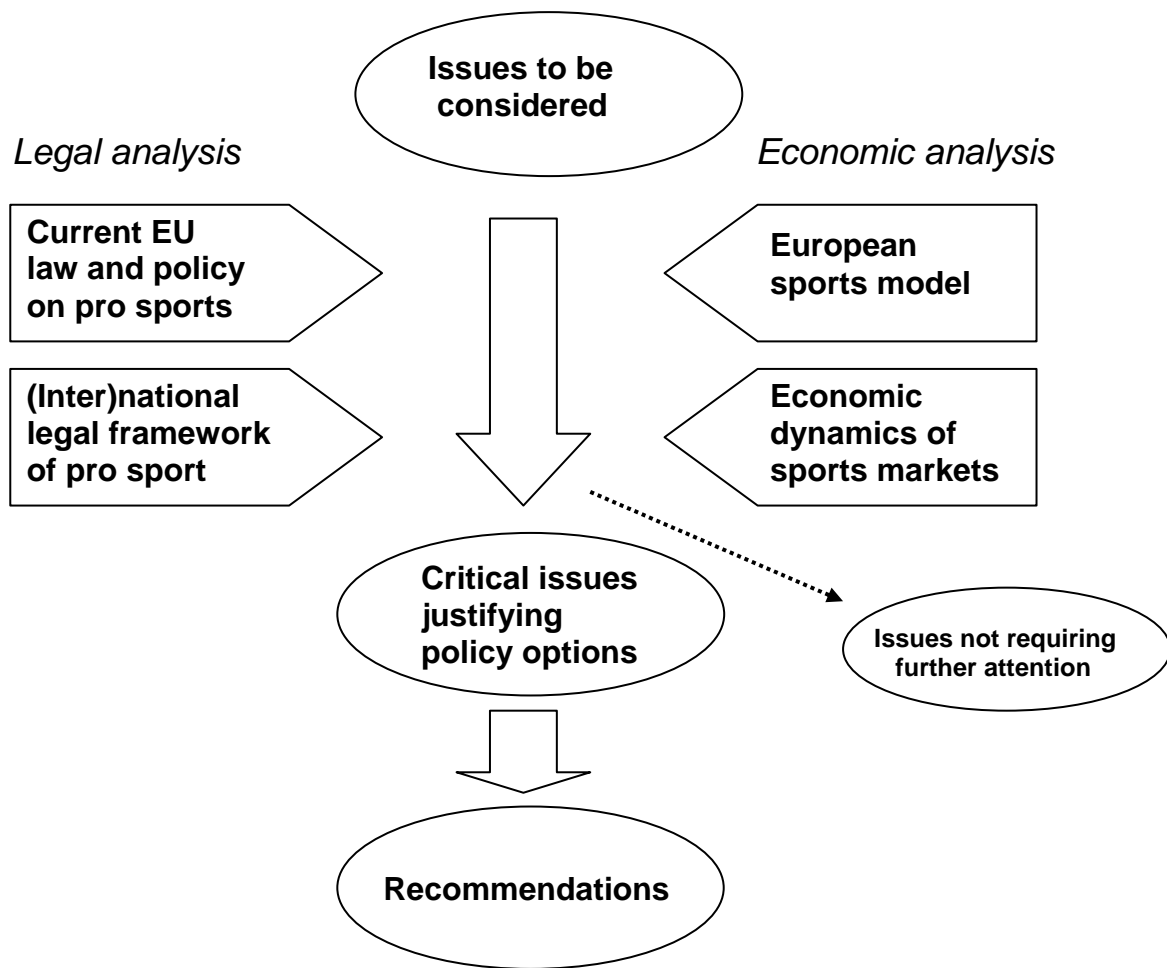
Are the sporting rules in conformity with EU law or not?

3.a) If an issue had been already tested: see in particular the pertinent case law of the European Court of Justice and/or the decisions of the European Commission (in particular, regarding competition law)).

3.b) If not, what is the possible outcome of future testing by Commission and/or Court?

Apart from the problems that had already been solved, what recommendations could be made or policy options advised in order to bring the sporting rules in conformity with European law, that is to bring out a level playing field and remove existing conflicts where necessary?

To the Study will be added a list of conclusions – in particular based on the identification of the relevant EC rules and their discussion in the light of possible recommendations and options - as well as a set of questions and answers (Q&A).



2 The EU's law and policy position with regards to sport

2.1 The legal status of sport in the EU

Article 5(1) of the EC Treaty provides that the European Union (EU) 'shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein'. Article 3 EC does not cite sport as a competence of the EU meaning that no authority has been conferred to the EU to develop a sports policy. Nevertheless, EU activities covered by Article 3 affect sport as it acts as the basis for the elaboration of a number of Treaty Articles which have an indirect impact on sport. For instance, Article 12 requires 'any discrimination on grounds of nationality shall be prohibited' and further Articles in the specific fields of employment (Article 39), establishment rights (Article 43), service provision (Article 49) and competition law (Articles 81-87) similarly have an indirect impact on sport. Furthermore, Articles 136-139 (social provisions) have implications for labour relations in the sports sector, particularly in relation to social dialogue and collective bargaining.

As there is no exemption for sport in the EC Treaty, sporting rules may be subject to the full application of the EU's legal framework. This may be problematic as sport does not operate under the same market conditions as other industries. Sport is more than a business, it is also a social and political activity which has developed a rule book to enhance competition rather than restrict it. This is in acknowledgement that pure market competition based on the desire by participants to achieve a position of monopoly / oligopoly serves no one's interest. In other words, the financial elimination of competitors will diminish rather than enhance the respective position of participants as the sporting 'spectacle' requires competitive balance. Without it, sport would not attract public interest. Such mutual interdependence between undertakings is an unusual feature in the Single Market. The rules of the EC Treaty are designed to combat market restrictions in more 'normal' industries and it is a moot point whether they contain sufficient flexibility to be sensitivity applied to sporting contexts.

Of course, as sport commercialises so it begins to resemble a 'normal' industry thus calling into question the appropriateness of special treatment. In 1998 it was estimated that globally sport sponsorship generated US\$15 billion, the sale of television rights US\$42 billion and ticket sales US\$50 billion. The European share of sports trade is 36%, second only to the USA with 42%. In sum, sport accounts for 3% of world trade.² Money breeds litigation and few of the many sports stakeholders, including governing bodies, sportsmen and women, clubs, broadcasters, investment companies and supporters, agree on how the money should be divided. Add to this the intensely political environment in which sports regulation is discussed, and it becomes clear that sports law is indeed a complex field.

The three most important provisions of the Treaty impacting indirectly on sport are:

- (1) Free movement provisions
- (2) Competition law provisions
- (3) Social provisions.

2.1.1 *Sport and the Free Movement of Workers*

Labour mobility is considered a fundamental right in EC law. From an economic perspective, labour mobility facilitates the creation of a single European market and contributes to economic prosperity. From a social perspective, labour mobility is a fundamental individual right and a means of improving ones standard of living. In recent years labour mobility has been deeply entrenched into Community law. The Maastricht Treaty established

² European Commission (1998), Developments and Prospects for Community Action in the Field of Sport, Commission Staff Working Paper, Directorate General X, 29/09/98. p.1 & 6.

‘European citizenship’, the Amsterdam Treaty further absorbed issues pertaining to labour mobility into the EU’s legal framework and the European Court of Justice continues to actively promote labour mobility in its jurisprudence.

Article 39 which governs the rights of workers to circulate within the Single Market provides that:

1. Freedom of movement for workers shall be secured within the Community.
2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.
3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:
 - (a) to accept offers of employment actually made;
 - (b) to move freely within the territory of Member States for this purpose;
 - (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
 - (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission.
4. The provisions of this Article shall not apply to employment in the public service.

Article 43 which governs the freedom of establishment provides that:

Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.

Article 49 which governs the freedom to provide services provides that:

Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.

The Council may, acting by a qualified majority on a proposal from the Commission, extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Community.

When considering how the EU’s free movement rules apply to sport, the following questions need answering:

1. Are sports bodies subject to EU free movement rules? EU free movement rules are directly applicable and render inapplicable all contrary national laws. They are also capable of having horizontal as well as vertical direct effect³. Thus, the obligations contained within them fall on individuals (sporting bodies) as well as on the state and the provisions contained therein can be relied upon in a national court⁴. In Walrave the ECJ stated that the ‘prohibition of such discrimination does not only apply to the action of public authorities but extends likewise to rules of any

3 See Walrave and Koch v. Association Union Cycliste Internationale [1974] ECR 1405 and Union Royale Belge Sociétés de Football Association and others v. Bosman [1995] ECR I-4291.

4 A national court may use Article 234 EC (preliminary reference procedure) to seek guidance from the ECJ on the interpretation of the Treaty and the validity and interpretation of acts of the institutions of the Community.

other nature aimed at regulating in a collective manner gainful employment and the provision of services⁵. Thus a party can rely on EU free movement law to challenge either a national law or an act of a sporting body which conflicts with the EC Treaty. Not to allow for this would risk creating inequality in how free movement rules are applied thus undermining their uniform application.

2. At what point are the rules engaged? EU free movement rules apply to work situations carried out outside the EU if the legal relationship of employment was entered into within the EU.⁶ Similarly, the reverse applies to instances whereby the legal relationship was formed outside the EU but the effect of the measure is felt within it. The rights of free movement extend to workers. The definition of ‘worker’ is a matter for Community law and not national law.⁷ If it were not, member states could modify the meaning of a worker in order to obstruct the application of free movement rules. A ‘worker’ is someone who performs services for and under the direction of another in return for remuneration during a certain period of time⁸. In *Walrave* the ECJ held that the work must constitute an economic activity within the meaning of Article 2 of the Treaty⁹. The ECJ regards most forms of non-trivial work as genuine work. An employee is protected by Article 39 whilst a self employed individual Article 49.

3. Are rules affecting amateur sport covered by EU free movement law? EU free movement law most obviously applies to professional and semi professional sports. Amateur sport can also amount to an economic activity even if a sports association or federation classifies its members as amateur athletes. In *Deliège* the ECJ examined the legality of selection criteria in judo. In determining whether Article 49 applied to the case the ECJ examined the means of her remuneration. Even though she was not directly remunerated for her activities she did receive grants and she was sponsored by a bank and a car manufacturer. Her activity was thus economic in nature (although it was left to the national court to form this judgement) and she could rely on Article 49. In addition, discriminatory nationality rules adopted by amateur sports federations may contradict free movement law if the rights accorded to nationals are construed as a ‘social advantage’. Article 12 EC, Regulation 1612/68 and ECJ jurisprudence indicate that social advantages should be interpreted as meaning all advantages which, whether or not linked to a contract of employment, are generally granted to national workers because of their objective status as workers or by virtue of the mere fact of their residence on the national territory, and whose extension to workers who are nationals of other member states therefore seems likely to facilitate the mobility of such workers within the EU. Thus non nationals have the right to be treated the same as nationals as this facilitates their (and their family’s) integration into the labour market and hence their labour mobility.

4. Are all restrictions on free movement prohibited by the Treaty? In order to determine whether the Treaty’s free movement provisions have been breached, the ECJ will normally adopt an orthodox methodology which (1) establishes whether the disputed rule contains a restriction on free movement and then (2) determines whether the rule can be objectively justified and whether the restriction imposed is a proportionate measure.

Restrictions: The Treaty prohibits discriminatory measures (both of a direct and indirect nature) and non-discriminatory rules which limit access to the employment market. Thus rules which are apparently neutral in terms of nationality are still capable of being defined as discriminatory because the rule favours nationals over non-nationals. However, only economic activities are covered by the Treaty. In *Walrave* the ECJ held that ‘having regard to the objectives of the Community, the practice of sport is subject to Community law only in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty’¹⁰. However, the prohibition on discrimination ‘does not affect the composition of sport teams, in particular national teams, the formation of which is a question of purely sporting interest and as such has nothing to do with economic activity’¹¹. Nevertheless, the

5 *Walrave* Para.17.

6 *Walrave*. Para. 28.

7 *Hoekstra v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten* [1964] ECR 177.

8 *Lawrie-Blum v Land Baden-Württemberg* [1986], ECR 2121.

9 *Walrave*. Para. 4.

10 *Walrave*. Para.4.

11 *Walrave*. Para.8.

ECJ did find that ‘this restriction on the scope of the provisions in question must however remain limited to its proper objective’¹². Thus the orthodox approach is to consider purely sporting rules as being subject to the ‘sporting exception’ which exempts them from the EC Treaty unless the rules are disproportionate. If the rule is considered to be a restriction and therefore subject to the rules on free movement, an examination of justifications and proportionality would then be undertaken to see if the restriction can survive. Alternatively, the ECJ may follow a less orthodox ‘rule of reason’ approach to determine that rules which do have economic consequences are nonetheless capable of falling outside the scope of EU free movement law as the rule is necessary (‘inherent’ – thus justifiable) for the proper functioning of the sport¹³. Thus the rule of reason approach is less orthodox in that objective justifications are considered before the determination of the existence of a restriction. Thus rules that fall within the scope of the sporting exception / rule of reason analyses are incapable of being considered ‘restrictions’. Examples of sporting exception / rule of reason rules which escape the scrutiny of free movement law include nationality restrictions in national team sports¹⁴, rules relating to selection criteria¹⁵ and other ‘rules of the game’ such as rules fixing the length of matches or the number of players on the field¹⁶. Examples of prohibited restrictions include nationality restrictions in the composition of club sport¹⁷, transfer clauses¹⁸ and the use of discriminatory transfer deadlines for players¹⁹.

Justifications and Proportionality: EU free movement rules establish that directly discriminatory rules are only permitted if they can be justified on the grounds of public policy, public security or public health²⁰. Other restrictions are capable of wider justification. In *Bosman* the ECJ agreed that ‘In view of the considerable social importance of sporting activities and in particular football in the Community, the aims of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results and of encouraging the recruitment and training of young players must be accepted as legitimate’²¹. However, on the proportionality test, the ECJ concluded that the use of transfer rules was not an adequate means of achieving financial and competitive balance nor is it a decisive factor in encouraging recruitment and training of young players or an adequate means of financing such activities, particularly in the case of smaller clubs. Furthermore, these aims can be achieved through less restrictive means and the use of the transfer regime was not necessary either to safeguard the worldwide organisation of football nor necessary to compensate clubs for the expenses which they have had to incur in paying fees on recruiting their players. In *Lehtonen*, the ECJ accepted another legitimate objective in relation to the use of transfer windows by finding that ‘late transfers might be liable to change substantially the sporting strength of one or other team in the course of the championship, thus calling into question the comparability of results between teams taking part in that championship, and consequently the proper functioning of the championship as a whole’²².

5. Are EU free movement laws restricted to EU workers? Non EU nationals may also benefit from the protection offered by EU free movement rules. The EU has entered into international agreements with third states, some of which contain non-discriminatory provisions. To determine whether such agreements can be relied on by non EU nationals the ECJ must establish whether the provision is directly effective. This requirement will be satisfied if the provision contains a clear and precise obligation which does not rely on the adoption of subsequent measures. In *Kolpak*, having established that Article 38(1) of the EU / Slovak Association Agreement does hold direct effect, the ECJ concluded that Article 38(1) precludes ‘the application to a professional sportsman of Slovak nationality, who is lawfully employed by a club established in a Member State, of a rule drawn up by a sports federation in that State

12 Walrave. Para.8.

13 As was held in *Deliège v. Asbl Ligue Francophone de Judo and others* [2000] ECR I-2549.

14 Walrave.

15 *Deliège*.

16 View of the CFI in Para.41. *David Meca-Medina and Igor Majcen v Commission* [2004] Case T-313/02

17 *Donà v. Mantero* [1976] ECR 1405 and *Bosman*.

18 *Bosman*.

19 *Lehtonen and Castors Canada Dry Namur-Braine v. Fédération Royale des Sociétés de Basketball and Ligue Belge-Belgische Liga*, [2000] ECR I-2681.

20 See Article 39(3), Article 46 and Directive 64/221.

21 *Bosman*. Para.106.

22 *Lehtonen*. Para. 54.

under which clubs are authorised to field, during league or cup matches, only a limited number of players from non-member countries that are not parties to the Agreement on the European Economic Area'. In a similar ruling the Court found that a very similar provision contained within in the EU / Russia agreement (Article 23) allowed a Russian footballer not to be discriminated against in terms of working conditions, remuneration or dismissal when he is legally employed in the territory of Spain ²³.

2.1.2 *Competition Law and Sport*

EU competition law serves a number of important functions. By forcing firms to drop anti-competitive practices, competition law contributes to industrial efficiency, the protection of small to medium sized enterprises and consumer protection. It breaks down barriers to trade within and between EU member states thus strengthening national markets and the Single Market. This promotes European integration and serves a similar role to late 19th century US anti-trust legislation which promoted the political integration of the US states. The key provisions of EU competition law are:

Article 81(1) provides that, 'The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between member states and which have as their object or effect the prevention, restriction or distortion of competition within the common market'.

Article 81(3) provides that, 'The provisions of paragraph 1 may, however, be declared inapplicable in the case of, any agreement or category of agreements between undertakings; any decision or category of decisions by associations of undertakings; any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question'.

Article 82 provides that 'Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between member states. Such abuse may, in particular, consist in: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts'.

Article 87: 'Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market'.

The above provisions have equivalents in national law. For example, Chapters I and II of the UK Competition Act 1998 performs the same function as Article 81 and 82 EC. Furthermore, Council Regulation No.1/2003 of 16 Dec. 2002 empowers national competition authorities to apply the exemption criteria contained in Article 81(3) EC. Actions in competition law can be brought privately via the national court / competition authority route or via the public enforcement route by way of complaint to the Commission. When considering how EU competition rules apply to sport, the following questions need answering:

23 Simutenkov v Ministerio de Educación y Cultura and Real Federación Española de Fútbol. Case-265/03, 2005.

1. Are sports organisations considered undertakings? If amateur, professional and semi-professional sports bodies and individuals are engaged in economic activity involving the provision of goods and services they will be deemed to be undertakings. This potentially includes not for profit activity.
2. Do sports rules / practices constitute ‘agreements’? Agreements can be reached between undertakings (such as clubs) or by an association of undertakings (such as the governing bodies).
3. Are sporting undertakings carrying out economic activity? Whilst the governing bodies of sport play an important non economic regulatory function, they also have responsibilities for ensuring the commercial success of the sport and are thus acting in an economic capacity. Even though the Commission adopts a wide definition of ‘agreement’ they need to distinguish between agreements that constitute rules of ‘purely sporting interest’ and those of an economic nature²⁴. Rules of ‘purely sporting interest’ are covered by the ‘sporting exception’ and are thus incapable of being defined as a restriction. They therefore fall outside the reach of competition law as long as the rules have been applied in an objective, transparent, non-discriminatory and proportionate way. Rules of marginal significance (*de minimis*) and those not having an appreciable effect on cross border trade will also fall outside the scope of the Treaty. The competition law test of what constitutes ‘of purely sporting interest’ differs somewhat from the free movement test. In competition law the economic activity relates to the undertakings in question. In free movement law it concerns the activity of the athlete alleging the breach of EU law.
4. Do sports rules / practices have the potential to prevent, restrict or distort competition in the EU? The sporting exception applies to rules of a non economic nature. These rules cannot be defined as restrictive. Agreements whose object or effect is to prevent, restrict or distort competition will be prohibited by Article 81(1). However, *prima facie* restrictive agreements need careful examination and proper account should be taken of the overall context in which a decision restricting competition had been made, paying particular attention to the objectives of the rule in question²⁵. Thus even restrictive rules are capable of falling outside the scope of competition rules if that restriction is subject to a rule of reason analysis in which the pro-competitive features of the rule in question are deemed to outweigh the anti-competitive features. Such restrictive rules are necessary for the proper functioning of sport. The unique nature of the European model of sport and the interdependence of clubs needs considering. For example, sports federations are monopolies and sport operates under different market conditions to other industries. A position of oligopoly would not serve the interests of the remaining powerful participants who rely on competition to make the game in question interesting and unpredictable. Thus on-the-field competition would suffer if off-the-field co-ordination was subject to the same scrutiny as in ‘normal’ industries.
5. Do sports rules affect trade between member states? If a sporting rule or practice cannot be considered as falling within the scope of the sporting exception or capable of passing the rule of reason analysis, it may still escape the reach of Article 81 following a market definition of the sports sector. It must be shown that a sporting rule or practice has an appreciable effect on competition in the relevant market. Clearly the single structure model of sport means that international federations play an important role. European sport therefore has strong international dimension. However, the broader the definition of the market, the less likely the rule or practice will be considered as having an appreciable effect on competition within that market. Clearly, not all sporting rules and practices have international implications as witnessed in UK case *Stevenage Borough FC Ltd v. Football League Ltd*.²⁶

24 Walrave. Para.4.

25 *Wouters and others v Algemene Raad van de Nederlandse Orde van Advocaten*, Case C-309/99. Drawing a distinction between purely sporting rules and rules with economic consequences is notoriously difficult and the application of *Wouters* may assist in shifting the focus away from this divide to one in which the objective of the rule is examined. Thus a restrictive sporting rule may contain economic consequences but it falls outside the scope of competition law because it is inherent in the proper functioning of the sport in question. For an elaboration of these ideas see Weatherill, S. (2005), *Anti-Doping Rules and EC Law*, *European Competition Law Review*, 26(7), 416-421.

26 *Stevenage Borough Football Club v Football League Ltd* (1996).

6. If the above assessment confirms that Article 81 is engaged, should sport qualify for an exemption under Article 81(3)? The application of a sporting exception, rule of reason the broader the definition of the market, the less likely the rule or practice will be considered as having an appreciable effect on competition within that market. Clearly, and market definition analysis may well remove sporting rules and practices from the scope of Article 81. Thus rules of purely sporting interest rules, which although having economic consequences are deemed to be inherent in sporting activity and rules not having an appreciable effect on competition, do not engage Article 81(1). Rules that do engage Article 81(1) and are considered restrictive are still capable of legal protection. Individual agreements could be exempt or agreements pertaining to the wider sports sector could qualify for a block exemption. A restrictive rule considered appropriate for an 81(3) exemption will contain economic consequences but will satisfy the criteria outlined in Article 81(3).

7. Are sports organisations capable of assuming a position of dominance within the relevant market thus engaging Article 82? A potential for a finding of dominance is enhanced due to a number of factors. First, the nature of the product market - the narrower the market definition, the greater the likelihood of dominance. Second, the nature of the European model of sport - this necessitates international sports federations to assume considerable (even monopolistic) control over the activities of members. The 'market share' of organisations such as UEFA is therefore considerable. Third, the nature of the rules employed by governing bodies to maintain the single structure model – often highly restrictive. Fourth, the nature of co-ordinated activities - clubs could be regarded as having a dominant position should they co-ordinate their activities. It is less likely an individual club would be found to have a position of dominance although the definition of the relevant market may show otherwise. Fifth, the nature of substitutability - the potential for a finding of dominance is enhanced by the limited scope for demand and supply side substitutability in sport. Sixth, the nature of the geographical market – is it EU or national? However, the finding of dominance is not in itself illegal and as such, the Commission must establish whether an abuse of this dominance has taken place.

8. Does Article 87 (state aid) have implications for sport? The issuing of state aid to sports clubs has the potential to affect competition between sporting participants. In forming a view on whether state support for sports bodies constitutes state aid and is prohibited by Article 87, the Commission must carefully consider the nature of the sport in question. As the Commission acknowledges, sport performs educational, public health, social, cultural and recreational functions²⁷. In French Professional Sports Clubs, the Commission concluded that the aid under scrutiny was of an educational nature and not state aid²⁸.

The Commission can become aware of potential breaches of competition law via: (1) own initiative investigations (2) self-notification by the undertakings and (3) individual complainants. Having become aware of potential competition violations, the Commission will resolve the case using one of the following procedures:

1. Informal settlement via negotiation with the undertaking(s) involved and via the issuing of a 'comfort letter' informing the party that the agreement does not infringe Article 81(1) or that an exemption is suitable.
2. Adoption of a formal decision granting negative clearance for the agreement or practice if that agreement or practice falls outside the scope of Article 81.
3. Adoption of a formal decision that the agreement or practice infringes Article 81. The Commission has the authority to impose a fine of up to 10% of the worldwide turnover of the infringing party. Decisions of the Commission are reviewable before the Court of First Instance (CFI) and on further appeal to the ECJ.

27 European Commission (1998), Developments and Prospects for Community Action in the Field of Sport, Commission Staff Working Paper, Directorate General X, 29/09/98.

28 Commission of the European Communities (2001), French Professional Sports Clubs [2001], Commission does not object to subsidies for French professional sports clubs, 25/04/01, DN: IP/01/599.

4. Applying the exemption criteria outlined in Article 81(3). Council Regulation No.1/2003 now empowers national competition authorities to apply the criteria.

5. To establish whether Article 82 applies to any given context, the Commission must identify (1) that an undertaking has a dominant position (2) that it has abused this dominance (3) that the abuse has had an appreciable impact on trade between member states. Unlike Article 81, there is no provision for negative clearance or exemptions under Article 82.

In forming a judgement on the above, the Commission is sensitive to the on-going political debate within the EU concerning the specificity of sport (see discussion below in paragraph 2.2. on “The policy position of sport”). This has contributed to an emerging competition law framework in which the Commission locates contested sports agreements in one of four categories:

1. Rules to which, in principle, Article 81(1) of the EC Treaty does not apply, given that such rules are inherent to sport and/or necessary for its organisation.
2. Rules which are, in principle, prohibited if they have a significant effect on trade between member states.
3. Rules which are restrictive of competition but which in principle qualify for an exemption, in particular rules which do not affect a sportsman’s freedom of movement inside the EU and whose aim is to maintain the balance between clubs in a proportioned way by preserving both a certain equality of opportunities and the uncertainty of results and by encouraging recruitment and training of young players.
4. Rules which are abusive of a dominant position under Article 82 of the EC Treaty. It is not the power to regulate a given sporting activity as such, which might constitute an abuse but rather the way in which a given sporting organisation exercises such power. A sporting organisation would infringe Article 82 of the EC Treaty if it used its regulatory power to exclude from the market, without an objective reason, any competing organiser or indeed any market player who, even meeting justified quality or safety standards, failed not to obtain from said sporting organisation a certificate of quality or of product safety²⁹.

2.1.3 Sport and Social Provisions

Many industrial sectors regulate the employment relationship between employers and employees through a social dialogue which can lead to the creation of collective bargaining agreement between the parties. Such a dialogue has been mooted for sport as a means of mitigating some of the deleterious consequences of sports relationship with EU free movement and competition law.

Articles 138 and 139 of the EC Treaty potentially provide the platform through which such a collective bargaining agreement in European sport can be achieved. Article 138 states that (1) ‘the Commission shall have the task of promoting the consultation of management and labour at Community level and shall take any relevant measure to facilitate their dialogue by ensuring balanced support for the parties (2) To this end, before submitting proposals in the social policy field, the Commission shall consult management and labour on the possible direction of Community action (3) If, after such consultation, the Commission considers Community action advisable, it shall consult management and labour on the content of the envisaged proposal. Management and labour shall forward to the Commission an opinion or, where appropriate, a recommendation (4) On the occasion of such consultation, management and labour may inform the Commission of their wish to initiate the process provided for in Article 139. The duration of the procedure shall not exceed nine months, unless the management and labour concerned and the Commission decide jointly to extend it’.

²⁹ European Commission (1998), ‘Commission debates application of its competition rules to sport’, 24/02/1999. DN: IP/99/133.

Article 139 states that (1) ‘should management and labour so desire, the dialogue between them at Community level may lead to contractual relations, including agreements (2) Agreements concluded at Community level shall be implemented either in accordance with the procedures and practices specific to management and labour and the Member States or, in matters covered by Article 137, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission. The Council shall act by qualified majority, except where the agreement in question contains one or more provisions relating to one of the areas for which unanimity is required pursuant to Article 137(2). In that case, it shall act unanimously’.

The advantages of Articles 138 and 139 for sport are threefold. First, they give sport the right of consultation and opinion over new Commission proposals. These opinions may affect the content of future legislation in the contentious fields of free movement law and potentially competition law. Second, they allow interested parties in sport to intervene in the legislative process initiated by the Commission. This means that via the conclusion of a Europe wide agreement, sport can take its own responsibility in regulating the subject contained in the Commission proposal. Third, Article 139 also allows the ‘social partners’ in European sport to initiate their own Community wide agreement independent of a Commission proposal. Such agreements can be implemented in accordance with national practice or via a Council Decision. The employment relationship between a club (as employer) and players (as employees) is likely to be the subject matter of such collective agreements. This covers contractual terms, transfer windows, the transfer system, salary capping, image rights, pension funds and doping rules.

2.2 The policy position of sport in the EU

Due to the broad nature of sport, some Treaty Articles contain measures closely associated with the operation of sport. For example, Article 149 (Education, Vocational Training and Youth) acted as the legal basis for the designation of 2004 as the European Year of Education through Sport. Similarly, Article 151 (Public Health) acted as the legal basis for EU interventions in anti-doping policy. Other measures directed at sport have had to be elaborated through non-legal measures such as policy papers, reports and political declarations as a consequence of the lack of a sports competence in the Treaty³⁰. Although lacking a legal base, these soft measures have been influential in highlighting the peculiarities of the ‘European Model of Sport’ in which sport operates under different market conditions to other industries. A common theme in these reports is the enunciation of a policy on sport acknowledging this ‘specificity’. The expansion in the EU’s involvement in sport has led to calls for this activity to be codified within the new Constitutional Treaty. Article 282 of the Constitutional Treaty defined sport as a ‘supporting measure’ thus granting the EU a competence in this field. However, the stalled ratification of the Constitutional Treaty suggests that sport will continue to operate detached from the Treaty. This raises important questions about the future role of the EU in sports policy.

EU sports policy has three dimensions:

1. As a Means of Promoting the EU
2. As a Means of Implementing Other Community Policies
3. As a Means of Mitigating the Effects of the Bosman Judgment

2.2.1 Sports Policy as a Means of Promoting the EU

Established by the 1984 Fontainebleau Summit, the Adonnino Committee reported on measures designed to strengthen the image of the EU. The Committee identified eight categories of proposals, one of which concerned youth, education, exchanges and sport. The report’s sports related recommendations read:

³⁰ Note the influence of Article 3 and Article 5 EC.

‘The administration of sport is predominantly the responsibility of sports associations independent of government. The Committee proposes that the sports associations be invited to encourage action where it is consistent with their responsibilities, along these lines;

- for certain sectors of sport, organisation of European Community events such as cycle and running races through European countries;
- creation of Community teams for some sports to compete against joint teams from geographical groupings with which the Community has special links;
- inviting sporting teams to wear the Community emblem in addition to their national colours at major sporting events of regional or worldwide interest;
- exchanges of sportsmen, athletes and trainers between the different Community countries, to be encouraged by programmes at the level of the Community and the member states;
- support for sporting activities especially for particular categories of persons, such as the handicapped. Student sport activities should be organised in conjunction with the twinning of schools and towns.’³¹

Throughout the remainder of the 1980’s the EU sponsored or promoted a number of sporting events such as the European Sailing Regatta, the cycling Tour de l’Avenir, the Tour Feminin, the Tour de France, the tennis tournament of Antwerp and a failed attempt was made at establishing the First European Swimming Championships (1987)³².

2.2.2 *Sports Policy as a Means of Implementing Other Policies*

The Adonnino approach was reviewed in 1991³³. The review focussed on improving communication with the sports world and providing funding opportunities for sport. The product of the first aim saw the development of the European Sports Forum, an annual meeting held between members of the EU and the sports world. In addition, the 1995 Coopers and Lybrand study on ‘The Impact of European Union Activities on Sport’ was commissioned³⁴.

Whilst the EU had previously sponsored and promoted sporting events, the 1990’s saw the development of a wider role for the Commission as it began to manage specific sports funding programmes, most notably Eurathlon and Sports for People with Disabilities. This took EU involvement in sport beyond mere self promotion to one in which sport was being employed to implement other socio-cultural policy goals. Following UK v Commission [1996] the Commission suspended these programmes as sport did not have a legal base in the Treaty and as such the Commission was not competent to commit expenditure in these fields³⁵.

Following the judgment, the Commission published a study examining ways in which sport can be integrated into other EU programmes including social cohesion, the integration of minorities and people with disabilities and the introduction of young people to the idea of active citizenship. Through the office of the Council Presidency, the member states routinely discussed sport in the context of employment policy, social exclusion, community regeneration, disabilities policy, health policy, education policy, vocational training, youth policy and media policy. Increasingly sport is viewed as a dimension of EU education policy. 2004 was designated the European Year of Education through Sport (EYES), the linkage with education partly reflecting the existence of an EU competence in the field of education but none for sport. The EYES project provided financial support for a range of sport / education events including meetings, voluntary actions, information and promotional campaigns, surveys, reports

31 Commission of the European Communities (1984), A People’s Europe, Reports from the ad hoc Committee. COM (84) 446 Final. Para. 5.9.

32 See Tokarski et al. (2004), Two Players One Goal. Sport in the European Union, Meyer and Meyer, 62-63.

33 Commission of the European Communities (1991), The European Community and Sport. SEC (91) 1438 of 31 July 1991.

34 Coopers and Lybrand (1995), The Impact of European Union Activities on Sport, Study for DG X of the European Commission.

35 UK v. Commission [1996] ECR I-02729.

and general financial support for transnational, national, regional or local initiatives to promote the objectives of the European Year of Education through Sport³⁶.

2.2.3 *Sports Policy as a Means of Mitigating the Effects of the Bosman Judgment*

Elements within the sports movement interpreted the Bosman judgment as an insensitive intervention by the ECJ into the world of sport. Following the judgment, the sports movement lobbied the EU to provide sporting rules greater protection from the application of EU law. A number of policy papers and political interventions discussed this.

The European Parliament discussed sport in three Reports. The 1994 'Larive Report' on the European Community and Sport, the 1997 'Pack Report' on the Role of the European Union in the Field of Sport and the 2000 'Mennea Report' articulated a desire to balance the economic regulation of sport with the promotion of sports social, cultural, educational and integrationist qualities³⁷. The Pack Report claimed that 'although the European Union has taken an interest in professional sport as an activity, it has, to date, only taken account in a very marginal fashion of the cultural, educational and social dimension of sport, and whereas such neglect stems basically from the fact that there is no explicit reference to sport in the Treaty'³⁸.

The issue of providing a legal base in the Treaty was discussed by the member states at the subsequent Amsterdam Summit (June 1997). Here, the Heads of State and Government attached a non-binding Declaration on sport to the Amsterdam Treaty. The Declaration read, 'The conference emphasises the social significance of sport, in particular its role in forging identity and bringing people together. The conference therefore calls on the bodies of the European Union to listen to sports associations when important questions affecting sport are at issue. In this connection, special consideration should be given to the particular characteristics of amateur sport'³⁹.

The member states added political impetus to the Amsterdam Declaration by releasing a further statement on sport as part of the December 1998 Vienna European Council Conclusions. The statement read, 'Recalling the Declaration on Sport attached to the Treaty of Amsterdam and recognising the social role of sport, the European Council invites the Commission to submit a report to the Helsinki European Council with a view to safeguarding current sports structures and maintaining the social function of sport within the Community framework. The European Council underlines its concern at the extent and seriousness of doping in sports, which undermines the sporting ethic and endangers public health. It emphasises the need for mobilisation at European Union level and invites the member states to examine jointly with the Commission and international sports bodies possible measures to intensify the fight against this danger, in particular through better co-ordination of existing national measures'⁴⁰.

In 1998, the Commission published a working paper, 'The Development and Prospects for Community Activity in the Field of Sport' which identified sport as performing an educational, public health, social, cultural and recreational function and that sport could be used as a vehicle through which policy objectives in these fields could be pursued⁴¹. However, the paper also noted that sport plays a significant economic role in Europe and that no general exemption from EU law could be permitted. Such an exemption was considered by the Competition Policy

36 Visit <http://www.eyes-2004.info/>

37 European Parliament (1994), Report on the European Community and Sport. Rapporteur: Mrs. J. Larive, European Parliament (1997), Report on the Role of the European Union in the Field of Sport, Rapporteur: Mrs. D. Pack, European Parliament (2000), 'Report on the Commission Report to the European Council with a view to safeguarding current sports structures and maintaining the social function of sport within the Community framework- The Helsinki Report on Sport', The Mennea Report.

38 The Pack Report (1997). Para.1.

39 Declaration No.29, Treaty of Amsterdam (1997).

40 Presidency Conclusions, (1998), The Vienna European Council (12/98).

41 Commission of the European Communities (1998), Developments and Prospects for Community Activity in the Field of Sport, Commission Staff Working Paper, Directorate General X.

Director General as ‘unnecessary, undesirable and unjustified’⁴². As a follow up, the Commission published the consultation document, ‘The European Model of Sport’⁴³. The document invited opinion on three issues: the organisation of sport in Europe, sport and television and sport and social policy. The findings of the consultation exercise acted as the basis for the convening of the first EU conference on sport held in Greece in May 1999, the conclusions of this conference in turn being used by the Commission to prepare the Helsinki Report on safeguarding current sports structures and maintaining the social function of sport within the Community framework.

The Helsinki Report was submitted to the December 1999 Helsinki European Council. The introduction claims that the aim of the report is to give ‘pointers for reconciling the economic dimension of sport with its popular, educational, social and cultural dimensions’⁴⁴. Section 4 of the Helsinki Report dealt with ‘Clarifying the Legal Environment of Sport’. Here the Report suggests ‘sport must be able to assimilate the new commercial framework in which it must develop, without at the same time losing its identity and autonomy, which underpin the functions it performs in the social, cultural, health and educational areas’. The Report proposes the adoption of a new approach which ‘involves preserving the traditional values of sport, while at the same time assimilating a changing economic and legal environment’ (p.7). In this connection, the Helsinki Report builds on a previous Commission paper published in February 1999 on the application of competition rules to sport⁴⁵. In that paper, the Competition Policy DG made a distinction between purely sporting situations which are immune from EU law and wholly commercial situations to which Treaty provisions will apply. However, the Report also indicated that even sporting rules of a commercial nature are capable of being exempt from EU law once the particular sporting characteristics of the agreement have been taken into account.

The European Council responded to the Helsinki Report by including within its June 2000 Santa Maria da Feira Presidency Conclusions the following statement... ‘the European Council requests the Commission and the Council to take account of the specific characteristics of sport in Europe and its social function in managing common policies’⁴⁶.

The Nice Treaty added no further Treaty comment on sport beyond the Declaration contained in the Amsterdam Treaty. It did, however, release a long Presidency Conclusion entitled, ‘Declaration on the specific characteristics of sport and its social function in Europe, of which account should be taken in implementing common policies’. Paragraph 1 of the Declaration commented, ‘even though not having any direct powers in this area, the Community must, in its action under the various Treaty provisions, take account of the social, educational and cultural functions inherent in sport and making it special, in order that the code of ethics and the solidarity essential to the preservation of its social role may be respected and nurtured’⁴⁷.

2.2.4 *Sport and the Constitutional Treaty*

A major advance for those supportive of sport’s Treaty status came with the discussions on the EU’s new Constitutional Treaty. Article III-282 of the Constitutional Treaty (agreed October 2004) proposes a change in the

42 Schaub, A. (1998), EC Competition Policy and its Implications for the Sports Sector, Speech delivered to the World Sports Forum, St Moritz, March 1998.

43 Commission of the European Communities (1998), The European Model of Sport. Consultation Document of DG X.

44 Commission of the European Communities (1999), Report from the Commission to the European Council with a view to safeguarding sports structures and maintaining the social significance of sport within the Community framework: The Helsinki Report on Sport, Com (1999) 644. P.3.

45 Commission of the European Communities (1999), Commission Debates Application of its Competition Rules to Sport, 24/02/1999. DN: IP/99/133.

46 Presidency Conclusions, (2000), Santa Maria da Feira European Council (06/00).

47 Presidency Conclusions, Nice, (2000), Declaration on the Specific Characteristics of Sport and its Social Function in Europe, of Which Account Should be Taken in Implementing Common Policies, Nice European Council Meeting, (12/00).

legal status of sport by defining it as an area for ‘supporting, co-ordinating or complementary action’ within the context of education, youth, sport and vocational training policy. Article III-282: Education, Youth, Sport and Vocational Training provides that:

282(1) ‘The Union shall contribute to the promotion of European sporting issues, whilst taking account of its specific nature, its structures based on voluntary activity and its social and educational function. Union action shall be aimed at: (g) developing the European dimension in sport, by promoting fairness in competitions and co-operation between bodies responsible for sports and by protecting the physical and moral integrity of sportsmen and sportswomen, especially young sportsmen and sportswomen’.

282(2) ‘The Union and its member states shall foster co-operation with third countries and the competent international organisations in the field of education and sport in particular the Council of Europe’.

282(3) ‘In order to contribute to the achievement of the objectives referred to in this Article, (a) European laws or framework laws shall establish incentive actions, excluding any harmonisation of the laws and regulations of the Member States. They shall be adopted after consultation of the Committee of the Regions and the Economic and Social Committee (b) the Council of Ministers, on a proposal from the Commission, shall adopt recommendations’.

A positive reading of Article 282 stresses: (1) Article 282 would require the EU’s judicial bodies to consider the ‘specific nature’ of sport when disposing of sports related cases. (2) Article 282(3) excludes any harmonisation of the laws and regulations of the member states thus safeguarding sporting autonomy. (3) Article 282 resolves the consequences of the UK v. Commission litigation on the legality of budgetary appropriations for measures with no legal base. (4) Article 282 would establish a more formal rolling political agenda on the subject of sports law and policy (5) Article 282 has symbolic value in that the non-economic dimension of sport has been stressed.

A negative reading of Article 282 stresses: (1) Article 282 does not offer sport an exemption from EU law. (2) Article 282 does not contain a specific horizontal integration clause which would place an obligation on the EU institutions to take sport into account in defining and implementing other EU policies and activities. (3) Article 282 represents a further unwelcome incursion on the part of the EU into sporting matters (and a breach of the principle of subsidiarity).

The rejection of the Constitutional Treaty in the French and Dutch referendums appears to have ended any prospect of Article 282 being adopted.

2.3 The European Model of Sport

The non-governmental structure of sport in Europe can be described as conforming to a ‘European model of sport’⁴⁸. The key features of this model are:

Sport in Western Europe has traditionally been organised on a ‘mixed’ model basis where the actions of governmental and non-governmental organisations have existed side by side. In pre-1989 Eastern Europe, sports policy was more closely directed by the state.

Sport in Europe is organised as a ‘pyramid structure’. This structure describes both the organisational and competitive dimensions to European sport. In organisational terms, the structure comprises European federations, national federations, regional federations and the clubs. In competitive terms, vertical fluidity within the pyramid is

48 For a more detailed description see, Commission of the European Communities (1998), The European Model of Sport. Consultation Document of DG X.

supported by performance (merit) based promotion and relegation. In modern sport, competitive fluidity is largely unobtainable without significant financial resources.

Whilst distinct, the European model of sport is heavily influenced by the Olympic Movement, the goals of which are contained in the Olympic Charter. This states that the Olympic Movement is to contribute to building a peaceful and better world by educating youth through sport practiced without discrimination of any kind and in the Olympic spirit, which requires mutual understanding with a spirit of friendship, solidarity and fair play. The Olympic Movement encompasses organizations, athletes and other persons who agree to be guided by the Olympic Charter and who recognize the authority of International Olympic Committee (IOC), the umbrella body of the Olympic movement. This includes Organising Committees of the Olympic Games (OCOGs), the National Olympic Committees (NOCs) the European Olympic Committee (EOC), the International Federations (IFs), the national associations, clubs and the athletes. Of course, the central task of the Olympic Movement (particularly the IOC) is to organise the summer and winter Olympic Games. They bring together the athletes designated for such purpose by their respective NOCs, whose entries have been accepted by the IOC, and who through their sports performances compete under the technical direction of the International Federations concerned (Rule 9 of Olympic Charter).

At the pinnacle of the European pyramid are the European federations although the European federations are usually affiliated to a world governing body. Hence, the Union des Associations Européennes de Football (UEFA) is football's European governing for football which is affiliated to Fédération Internationale de Football Association (FIFA), the world governing body. Usually, European federations will attempt to maintain their regulatory dominance by only permitting one national federation per country to be affiliated to it. An important grouping of European non-governmental sports federations is the European Non-governmental Sports Organization (ENGSO). In 1995 ENGSO created its official Statutes and it aims to 'promote the unity of sport, in all ranges of activity from mass to elite sports, to promote and defend the independence, autonomy and common interests of its members and to help improve sports development in the members' countries and to increase co-operation within European sports' (Article 2). In particular, ENGSO works closely with the EU and it has consultative status with Council of Europe. ENGSO has 40 member federations.

Below the European federations lie the national sporting federations who are affiliated to the European federation. A national federation organises and regulates the sport in question within the national territory. The national federations represent their members within the European or international federation and they organise national championships. National federations play an important role in Europe as many sports place heavy emphasis on the performance of national teams competing against one another.

Below the national federations lie the regional federations who are responsible for organising regional championships or co-ordinating sport on a regional level.

At the base of the pyramid are the sports clubs. Dominating this level are amateur sports men and women and administrators who are unpaid. The sports clubs offer the opportunity to local people to become involved in sport. As such, the clubs perform an important social function.

3 The economic framework for professional sports⁴⁹

This chapter focuses on the major economic aspects regarding sport in the internal market and competition issues. It starts with an economic definition of the sport market (paragraph 3.1.), followed by a description of the European Model of Sport and how this structure influences the behaviour of sport organisations (paragraph 3.1.). To put this European Model in perspective, paragraph 3.3. offers a short description of the American Model of Sport and highlights the differences in background and characteristics of the two models. Paragraph 3.4 offers insight in the economic dynamics of sport markets. Paragraph 3.5 describes how these economic dynamics work out within the traditional European Model of Sport and identifies some problems and developments to be considered in future policy making.

3.1 The definition of the sports market

3.1.1 Definition by the involvement in sports

There are many ways to define the sport market. Sports economists have come up with different models that include the various sub-sectors of the sport market. A comprehensive model is developed by Li, Hofacre and Mahony⁵⁰. They define the sport industry as the cluster of:

- firms and organisations that produce sport activities;
- firms and organisations that provide products and services to support the production of sport activities, and
- firms and organisations that sell and trade products related to sporting activities.

Based on this definition they constructed a sport industry model which consists of two main sectors. The first sector is the sport activity producing sector. This sector includes all firms and organisations that produce sport games, events and services. Professional teams are in this sector, as well as fitness clubs, sport and recreation departments, independent athletes, trainers and instructors and owners of racing participants (horses, cars). The sport activity producing sector is the core of the sport industry.

The second sector is the sport supporting sector. The firms and organisations that make up this sector are in the role of either providing products and services to support the production of sporting activities or selling and trading products that are related to sport activities. There are six sport supporting sub-sectors:

- administrative and regulatory sport associations (for example, UEFA, PTA)
- sporting goods manufacturers
- wholesalers and retailers

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50 Li, M., S. Hofacre and D. Mahony, *Economics of Sport*, Fitness Information Technology Inc., 2001.

- sports facilities and buildings
- sport media
- sport management firms
- local and regional sports authorities.

It must be noted that the sport supporting sub-sectors overlap somewhat with the sport activity producing sector because sometimes firms and organisations in the sport supporting sector also sponsor and organise sport events.

3.1.2 *Definition by the nature of sports*

An economic definition and segmentation of the sport market can also be based on the differences in the nature of sports and sporting activities. Various segmentations are used, however none offers a sharp line between the presented segments. A practical segmentation with interesting aspects for policy making is:

- 1) Sports and sporting activities focussed on good health (obesity) and social integration. This includes the majority of all amateur and youth sport, as well as all sporting activities within the educational system. Key word: 'participation';
- 2) Sports and sporting activities focussed on performance (medals and championships). This includes the performance driven part of amateur sports, with athletes and teams competing at the highest national level and putting substantial amounts of time in their sport. Key word: 'winning';
- 3) Sports and sporting activities focussed on performance as well as commercial exploitation. This includes all sports which have enough economic drawing power to fans, sponsors and the TV-audience to be organised on a commercial and professional basis. Athletes and teams operate in an environment where sport is as much of a - product as an activity. Key word: 'entertainment'.

Each type of sport has its own characteristics and environment. For competition analysis the last type ('commercialised sport') requires the most attention, as athletes and clubs in this segment compete on sportive as well as on economic terms. The middle segment sometimes shows fierce competition battles as well. In this case, it is emotions and ambitions rather than economics that ignite the discussions.

When it comes to terms like 'level playing field' and 'relevant market' it is impossible to come up with clear cut definitions. As many athletes and clubs - especially those in the commercialised segment - often take part simultaneously in different competitions, both national and international, it is hard to determine whether or when their actions influence 'interstate commerce', hence affect the issue of level playing fields.

Regarding state public aid to football clubs, the Commission points out that public subsidies to clubs in the highest division of professional football are not allowed as these influence interstate commerce, considering the fact that the clubs have a chance to participate in international club football. Public subsidies to clubs in the second division are more or less allowed as they are not likely to affect interstate commerce (no international football). However, this position neglects the fact that even clubs in lower divisions of professional football are internationally active when it comes to the player market.

As the economic dimension of sport is still evolving, it is impossible to produce a clear cut definition of the sport internal market. For the time being, each competition case has to be judged individually. Knowledge of the world of sport and sport economics is required in each case to determine the (size of the) relevant market.

3.2 **The European Model of Sport**⁵¹

51 This chapter is based on European Sports Law, a comparative analysis of the European and American models of sport, by L. Halgreen (Paragraph 3.5).

Before the end of the Cold War there were two models of sport in Europe: the state-regulated communist model in Eastern Europe and the privately regulated Western European model. After the fall of communism the Eastern European countries also more or less adopted the Western European model. The main characteristics of this European Model of Sport are:

- the hierarchal, pyramid structure in which almost all sports are organised;
- the mixture and interdependence of amateur and professional sports;
- the system of promotion and relegation
- the focus on utility

3.2.1 Pyramid structure

The central element of the European Model of Sport is the pyramid structure of sport organisations. In each sport, the bottom of the pyramid consists of local clubs and athletes. Their actions are regulated by National Federations which have the authority to organise sport competitions and select national teams. They are members of the Continental Federations (for example, UEFA), which are overseen by the International Federations (for example, FIFA). In general, the pyramid is based on democratic principles, where all organisations are member of the next-level governing body and elect the chairman and directors of this organisation. Most European countries also have an umbrella federation which oversees all sports, such as the Deutscher Sportbund (DSB).

Within the pyramid structure of the European Model of Sport, only one national federation for each sport is allowed. This one-federation-per sport principle makes the system easy to manage, but is by nature a monopolistic structure which is strongly self-supporting, and which makes it extremely hard for new leagues to enter the market. Today, very few sports experience serious competition between rival federations, with boxing as a well known exception to that rule.

3.2.2 Amateur and professional sports

Interesting about the European Model of Sport is that the same governing body regulates all sporting activities within a particular sport, from amateur and youth sports to the highest professional level. This often leads to long and fatiguing battles between amateur and professional interests. These discussions intensified when, inspired by the rise of commercialisation in the 1980's, many sport federations expanded their activities from sole governing bodies to participants in commercial enterprises.

Many national and international sport federations have signed lucrative sponsor deals. In some cases their obligations to the national team sponsors have caused conflicts with the commercial interests of clubs and individual athletes. A striking example was the refusal of Belgium tennis player Kim Clijsters to participate in the 2004 Olympics because the outfit of the Belgium Olympic team conflicted with her own outfit sponsor deal.

Although the overwhelming majority of participants in any sport are youth players or pure amateurs, sport organisations take great interest in professional and commercialised sports. In order to promote the overall interest of sport, they exploit the commercial value of sport and redistribute some of the revenues 'downward' to the 'grass roots' of the game and thus promote so-called 'vertical' solidarity between amateur and professional clubs and athletes.

The relationship between elite sports and the grassroots level is described in the "double pyramid theory". According to this theory thousands of amateur athletes generate a few Olympic champions (feeding), while these champions inspire thousands to participate in amateur sports (inspiring).

As much as amateurs benefit from the promotional and commercial value of professional sports, professional clubs need the support of unpaid volunteers of the amateur branch and (financial) support of local and regional governments. This mixture of public and private funding is another distinct feature of the European Model of Sport.

3.2.3 Promotion and relegation

Another important characteristic of the European Model of Sport is the 'open' competition model, based on promotion and relegation. Most sport competitions have a pyramid-like structure where each season clubs or athletes are grouped based on their sportive quality. At the end of a season, champions promote to a higher level, while the team(s) with the worst records move down one step. At the top of the national pyramids teams can qualify for international club competitions. Only recently have several (inter)national federations adopted non-sportive criteria (licensing) to grant clubs the right to participate in professional competitions. These criteria often refer to the financial situation of the clubs.

In the past, maintaining competitive balance (sportive equality) has never been an important issue in the European Model of Sports. Although some measurements were installed to limit the powers of rich clubs (for example, quota on foreign players and the redistribution of pooled TV-income), the open structure limits the incentives for 'horizontal solidarity' (within the league), as each year clubs leave and other clubs join the competition. The notion that revenues should be divided equally for the 'good of the game' has never really been part of the European Model of Sports.

3.2.4 Utility

Contrary to their American counterparts (see next paragraph), European sport organisations and clubs are in general not driven by profits. Priority is given to sportive performance, with financial aspects serving as constraints for the ambition on the field. In other words, clubs focus on sportive achievements while trying to maintain an acceptable financial situation. This raises the interesting question 'what is acceptable'? Over decades, many European football clubs have challenged the social acceptance of their sportive ambitions by creating enormous financial deficits.

In the first half of the twentieth century, in some countries football clubs received subsidies from local governments or industrial patrons such as Fiat, Bayer, Philips and Peugeot. At the end of the century this courtesy seemed to return with many local governments saving their home club from bankruptcy and wealthy individuals more or less buying football clubs and investing large amounts of money in an effort to buy sportive success and status.

To put the European Model of Sport in perspective, the next paragraph presents a short description of the more commercialised American Model of Sport.

3.3 The American Model of Sport

The American Model of Sport differs in many ways from the European Model. For one thing, it is organised on a more overtly commercial basis, with a strong emphasis on the entertainment aspect of sport. The main characteristics of the American Model of Sport are: a strict division between amateur and professional sports, focus on profit-maximising, closed competition structures based on economic rather than sportive entry barriers and the use of various measures to ensure competitive balance between clubs.

The American Model of Sport is characterised by a strict division between amateur and professional sports. Amateur sports are mainly university sports, all governed by the NCAA⁵². Outside the educational system hardly any state or national structure for amateur sports exists. Although collegiate sports are by definition amateur sports, they tend to be organised very professionally. Many universities have sport budgets far exceeding those of professional sport organisations in Europe.

Professional sports centre around four sport leagues: Major League Baseball (MLB), National Football League (NFL), National Basketball Association (NBA) and National Hockey League (NFL). Each of these four sports is strongly commercialised. The participating clubs, which are referred to as 'franchises' of the League organisation, are owned by individuals or companies and run like businesses, with the objective of maximising profits. The clubs have installed a controlling body to organise competition and carry out collective marketing activities aimed at generating as much income as possible for its member clubs.

The leagues are internationally organized, in a sense that they consist of teams from the US, as well as from Canada. Outside the league structure there is no international team competition nor are players released for representative duties as national team sports play less of a role in the US than in Europe.

In 1991 the NFL took an innovative step in its international marketing strategy. In an effort to boost interest in American Football in Europe, it founded NFL Europe, a stand alone competition with no ties to any National or European Federation. Several European capitals were selected to become home to an NFL Europe team. Up to today, almost all costs of NFL Europe are paid for by the collective of all American NFL-teams. All 50 players on each NFL Europe team are on the pay roll of one of the American teams. This all in an effort to increase consumer demand for NFL merchandise and TV programming.

Contrary to its European counterpart, the American Model of Sport is based on a closed competition structure, with no promotion or relegation. Leagues consist of a fixed group of clubs, with the number and location of its members determined by economic and financial criteria. Based on market developments, and economic criteria, team owners and the League could decide to move a team to a more profitable market or add one or more new (expansion) teams.

Remarkably, the profit-oriented sport organisations in North America show more horizontal solidarity among them than their utility-oriented European counterparts. Team owners are willing to give up a considerable amount of power and money for the benefit of the league as a whole. Based on economic ratio, they realise that a well balanced, exciting competition benefits all teams and their owners. Fans do not want to watch sport if on-the field competition is weak. Even the wealthy and profitable New York Yankees realise they have to support the weaker teams in their League in order to keep the baseball product interesting. Therefore all leagues have adopted several measures that enhance the competitive balance between clubs on the field by limiting the economic competition off the field. Bosman style reserve clauses, roster limits, salary caps, revenue sharing, collective bargaining arrangements, payroll taxes, and allocating new talents to bad performing teams (draft system) are examples of measures installed to limit the effect of market powers and to enforce exciting competition (and thus increase profits).

Interestingly, competition authorities in the United States acknowledge the specific economic nature of the sport market by having granted professional sports several exemptions from competition law.

⁵² National Collegiate Athletic Association.

3.4 The economic dynamics of the sports market

After having looked at the European and American Models of Sport, this paragraph focuses on the economic aspects of professional sports. How does the European market for professional sports differ from other markets and how does this influence the behaviour of sport organisations? The main issues to be discussed are:

- the opportunist management of professional sport organisations
- the peculiar economics of professional sports: competition and solidarity
- the winner-take-all character of sport competitions
- a transition in financing models

3.4.1 *Sport management: ambitious or opportunistic?*

Over and over again, football clubs throughout Europe run into serious financial trouble. Why is it that professional sport organisations, often managed by experienced business persons, continuously seem to have problems meeting income and expenses?

When, before the start of the season, managers or fans are asked how their team will do, all answers are optimistic. For example in The Netherlands, almost always more than three teams expect to finish in the top-3, no teams expects to be relegated. And based on the team quality at the beginning of the season, more often than not their expectations should be considered realistic. Ambition is the heart and soul of sport organisations. From the manager to the groundskeeper, everybody and everything is focussed on improving, from last game or last year.

During the season, or at its end, apart from a rare over-performer, most clubs and athletes face disappointment. They have not met the ever high expectations. It turned out that only three teams could make it in the top-3 and that one or two of the teams are forced to be relegated. And the big problem is that in sport very little things can mean the difference between third place or fourth. A stupid own goal, a missed penalty, an injured striker. And to make things worse, rewards tend to differ enormously between one place and the next. Qualifying for European Cup football is a very lucrative achievement. Staying in the top division or being relegated might mean millions of euros of difference in TV revenues.

Companies in other industries can do market research to estimate their future income. Sport organisations and athletes do not have this option and are much more vulnerable when it comes to their income. Just as any other business, they have to invest first, acquiring top quality players and facilities. But whether these investments pay off depends on the hardly predictable sporting results, with often large differences in rewards.

It is already tough to keep the books balanced when things are going normally. The real trouble starts when the game is on the line. Suppose several clubs are fighting possible relegation. Knowing that relegation would mean a loss of millions, one of these clubs sees its top striker get seriously injured. It is offered the possibility of acquiring a new striker. Knowing his productivity over the last years, the manager is convinced that this boy will keep the club at the highest level, thereby securing millions of dollars of TV-revenue. But the transfer fee would require the club to take a loan which it might not be able to pay when it is relegated. A decision worth millions, which failure or success might be determined by a penalty in the last minute of the deciding game. Decisions like these might already look tough on paper, imagine them in the opportunistic context of a sport organisation.

3.4.2 *Sports economics: sporting competition, economic solidarity*

Our capitalist economy is based on competition. In any industry, companies or organisations compete with each other in an effort to reach their goals in terms of market share or profits. The intensity of the competition may vary between industries, but in general parties are out to increase their gains at the cost of their competitors.

Entrepreneurs and business men are driven by the ambition to maximise profit and drive all their competitors out of business.

In the business of professional sports, economics tend to work out differently. The main reason for this is one of the peculiar characteristics of the sports market. In this market a 'producer' is not able to create a product (being a single game or a competition) without the active participation of one or more of its competitors. Only by joining forces with rival clubs and athletes, they are able to create interesting products for fans, sponsors and the TV audience.

Destroying all competition just will not work in sports. Without opponents to play, even the best clubs and athletes have nothing to offer to their fans, sponsors and TV audience. Clubs need their competitors to survive. Even more remarkable is the fact that they are even better off when these competitors are almost of equal strength. Research has shown that games and competitions with a high degree of competitive balance (equal sportive strength) attract more attention and income than games and competitions in which it is easy to predict the final outcome.

Paul Tagliabue, Commissioner of the National Football League summed it up when he said: 'Free market economics is about driving enterprises out of business, sports economics is about keeping enterprises in business on an equal basis.' His quote clearly indicates the necessity of economic solidarity among sport organisations, even though they fiercely compete with each other on the field.

3.4.3 *The winner-takes-all: a threat to solidarity*

In addition to the above analysis, there is another economic law that dictates much of what goes on in the business of sports. In most markets, differences in market share or profit reflect differences in the quality of the products or services that are offered to the market. Products of comparable characteristics will normally deliver comparable rewards. However, in some markets small (often not noticeable) differences in the relative quality of products account for enormous differences in rewards. This is for example the case in the art and entertainment industry, where pop stars who might hardly sing better than many amateur singers sign very lucrative contracts and paintings of dubious technical quality sell for large amounts of money.

These markets, which are called 'winner-take-all' markets all have in common that - for whatever reason - all demand is focussed on only a small portion of the available supply. Parties try to outbid each other to acquire just this specific top product, service or athlete and are not willing to go for surrogate options. This of course raises the value of the winners tremendously⁵³.

The sport market has many characteristics of a winner-take-all market. Fans, press and sponsors often only seem interested in the champions. They outbid each other to team up with the best and forget about the rest. This is why prices of top products, top players and top clubs continue to rise, where the average clubs and athletes face a steady decline in their commercial value.

3.4.4 *Financing models: SSSL and MMMMG⁵⁴*

Within the European Model of Sport, football clubs traditionally had a financing structure based on Spectators - Subsidies - Sponsors - Local (SSSL). This financing model is still valid for about 90 percent of all clubs. However,

⁵³ This paragraph is based on *The Winner-Take-All Society, Why the Few at the Top Get So Much More than the Rest of Us*, by R.H. Frank, and P.J. Cook, 1995.

⁵⁴ This paragraph is based on *European and US sports business models*, by W. Andreff and P.D. Staudohar, in *Transatlantic Sport, The Comparative Economics of North American and European Sports* (edited by C. Pestana Barros, M. Ibrahimo and S. Szymanski), 2002.

during the 1980's and especially the 1990's these traditional sources of income were not sufficient anymore for the major clubs, who were facing growing needs linked to higher salaries and the demand to acquire the best players in order to be successful in a market where competition is very intense. At the same time new sources of income became available and the major clubs shifted to a financing structure based on Media - Magnates - Merchandising - Markets - Global (MMMMG).

The emergence of this new model was the result of deregulation, dependence on financial markets and economic globalisation in professional sports. With the adoption of this model, shareholders who expect a return on their investment started to define the rules of governance of these clubs. Today, both types of clubs co-exist within European football.

The development of the more commercially oriented financing model is in line with the economic analysis that market power has become the leading factor in determining long term economic success. Modern football is dominated by clubs from large metropolitan areas with strong national (and local) tv markets. The size of their markets allows them to generate more revenues, buy better players and win trophies. Apart from incidental successes, teams from smaller markets are unable to compete with these economic giants. They will have a tough time balancing the books as they do not have the same power to generate revenues because of their smaller home markets, while at the same time their player costs are driven upward by their rich competitors who act on the same international player market.

3.5 The European Model of Sport and economic dynamics: problems and developments

Due to the ongoing commercialisation of European sports (especially football), economic ratio plays an increasingly important role in the behaviour of organisations within the European world of professional sports. With football clubs listed at the stock market and the financial interests becoming larger, elements of the American Model of Sport have found their way to the European sport market. The following examples leave no room for doubt that economic ratio is currently challenging many of the sports traditions and emotions.

The recent take-over of Manchester United by American business man Malcolm Glazer is an interesting example of this development. Profit-oriented Glazer has already announced that his sole interest is to exploit the widely known brand of Manchester United.

UEFA and the major football clubs united in the G-14 have ongoing discussions on the optimal structure of the Champions League. G-14 has more than once threatened to leave the traditional football structure and start a highly commercialised independent Super League. UEFA has countered these threats with a possible ban on both the clubs and their players.

One of the biggest problems in European sport today is the issue of solidarity. It is easy to see that in the sporting world, where the richest clubs attract the better players, the ever present economic principle of winner-take-all turns itself into a self-fulfilling prophecy. The small number of clubs that has managed to develop into MMMMG-organisations the standings of all European competitions. The large majority of clubs still based on the traditional SSSL-model has to accept the fact that their geographic location (market size) denies them a fair chance to become a steady winner, both in the rankings and on the financial side. They are forced to focus on periodic sportive success and face structural financial challenge to stay in the black.

In a closed competition system, like in the American Model of Sport, horizontal solidarity among rich and poor is easier to achieve as interdependency among clubs is quite large. In our open competition structure it is hard to organise horizontal and vertical solidarity on a national level. Rich clubs tend to neglect their poor colleagues as they are often looking up to take part in international club football. Rather than redistributing revenues to maintain

or increase domestic competitive balance, top clubs argue that they need all their revenues to remain competitive on an international level.

In line with the above mentioned ideas of the G-14, many sports experience a continuous threat of the top performers breaking away from the traditional pyramid structure to form an independent commercial league. This has for example been the case with the Euroleague in basketball. The major problem of such a breakaway of the top performers of a sport is that this small group of teams or athletes represents the sports most valuable asset. As shown before, in the European Model of Sport, amateur sports rely heavily on the commercial drawing power of the professionals. This vertical solidarity is undermined when the money magnets leave the system to start a rival league and keep the revenues to themselves. Another clear example is speed skating in The Netherlands.

In The Netherlands the national skating federation (KNSB) used to have the only professional skating team. The money paid by its main sponsor is used not only to support the national team, but also to support all amateur skating throughout the sportive pyramid. In the early 1990's some top skaters and sponsors started several commercial skating teams, leaving the KNSB and Dutch amateur skating without its major assets. Over the years discussions have been going on to restore the ties between professional skaters, their sponsors and the KNSB pyramid as the 'grass roots' of skating.

For the good of sport, the great challenge is to come up with a new kind of solidarity within the open European sport structure. This structure, which has hardly seen any changes over the past decades, needs to be adapted to the new business-oriented market conditions that surround modern professional sports. Measures are needed to safeguard the financial and emotional relationship between the socially valuable grassroots of sports and the commercially valuable top performers.

Due to the fact that the sporting and commercial rat race in open competitions hardly offers any incentives for the rich to take care of the poor and maintain an interesting level of competitive balance, such measures will have to be more or less forced upon them. To quote Jean-Francois Bourg: 'In Europe, self-regulation is less and less accepted and used, whereas the North American League has practiced it for decades. Therefore, it would be appropriate to wonder about the way to preserve competitive balance in Europe. In addition, regulation needs to restore championships to economic coherence and financial viability. And there will be practical difficulties. Regulation aimed at enhancing the uncertainty of results leads to pressures on leagues under competition law and to methodological difficulties concerning relevant geographical areas and sporting structure. Paradoxically, the current application of competition law in Europe leads to a protection of the partners (suppliers, equipment makers, broadcasters, sponsors) and to an economic, financial, and sporting concentration around several major clubs.'⁵⁵

Bourg concludes his article by saying: 'A more flexible and contemporary application of competition law could help to balance competition that has been damaged by a free-market structure and opportunistic behaviour of clubs. () A more collective system would preserve both the product and the system of professional sports. It is the lack of such an approach that makes the current behaviour of European sports bodies dangerous. They do not take into account the impact that the economic differences between rich and poor can have on competition. () The current organisation of team sports in Europe is not incompatible with the development of economic solidarity, which could be encouraged via the law on competition. To do this, sport bodies can claim the benefit of a 'sporting exemption', which would exclude the professional team sports market from the application of articles 39, 81 and 82 of the Union Treaty.'

However, such an exemption alone would not solve the problem of regulation. With an exemption, there might still be a painful lack of solidarity. Bourg therefore prefers the use of the partial and conditional exemptions anticipated in the Union Treaty. Exemption shall only be granted when sporting bodies can prove that they will use the

55 Bourg, J., Professional Team Sports in Europe: Which Economic Model?, in International Sports Economics Comparisons (edited by R. Fort and J. Fizel), 2004

exemption to redistribute the benefits in an effort to balance the competition. If this is not the case, competition law will stand and the monopolistic structure of sport bodies might successfully be challenged with new initiatives like the Super League or the Atlantic League.

Bourg is convinced that the aims of sport bodies (competitive balance in championships) and those of the competition judges (competitive equilibrium in the concerned markets) could be similar, 'for the 'glorious uncertainty of sport' is not the result of a free market working of the championships market, but rather the result of a united organisation'.

So it seems likely that legislation should play a role in redefining solidarity in sports. Based on the peculiar economics of sport and current developments in European sports, there might be reason to give competition law regarding sports a second look.

4 Analysis of relevant sporting issues

4.1. Freedom of movement

4.1.1 Home Grown Players Rule and the European Union

4.1.1.1 Introduction

In this contribution we will explain the background of the UEFA home grown player Rule, UEFA's initiative to preserve a level playing field in European professional football. After we have clarified this initiative we will give an outline of the relevant EU case law in the light of this subject. After these two introductory assessments we will examine if there currently exists a level playing field in the internal market as regards to the accessibility of talented players to the European labour market in professional football, and if not, how to possibly create it. Finally we will report on the stakeholders in this discussion and conclude with possible steps to be taken by the European Union governmental authorities.

UEFA intends to impose specific quotas on top clubs for locally trained players in Champions League and UEFA Cup Matches. This was one of the results from UEFA's Ordinary Congress on 21 April 2005 in Tallinn, Estonia.

The declaration agreed upon in Tallin is part of UEFA's plan to enhance training and development of young talents. According to UEFA the "training and development of young players is of crucial importance to the future of football. Every football club in every national football association should play a part in this process."

From the season 2005-2006 on four "home grown players" must be included in squads for European club games – at least two trained by a club's own academy with a further two developed by other clubs within the same association. Until the season 2008/2009 the minimum number of home grown players will be raised up to eight.

The term "home grown" does not refer to the players' nationality but means all talents trained and educated between the ages of 15 and 21, UEFA believes that it avoids any conflict with EU law, in particular the freedom of movement.

Besides of the fact that there are practical concerns – some clubs and leagues fear that a "hunt" for (even) younger talents will break off in Europe – there are also legal implications.

From an EU perspective the starting point for possible legal implications is the fact that the proposed rule would indirectly discriminate foreign nationals. Hence, it is quite obvious that most of the "home grown" players would be nationals of the specific state and not foreigners. The proposed rule would indirectly discriminate foreigners, making it more difficult for foreign players to transfer to a country where they were not trained and educated.

4.1.1.2 Hierarchy of law

The main implication for the proper functioning of UEFA's home grown player rule would be the fact that a limitation on the employment of foreign nationals by a football club would be based on a regulation of a governing body in sports. In legal terms these regulations fall under "association law".

4.1.1.3 EU case law

In the hierarchy of law these association regulations need to respect at least to other "layers" of law that prevail over association law: national "formal / statutory" law of the member states of the European Union and EU law.

There has been case law in the European Union that has dealt with the issue of the non-eligibility of foreign nationals for sporting teams. We will briefly describe the content of these cases below in a chronological way, limiting ourselves to the relevant conclusions or where necessary to an introductory background.

4.1.1.4 Dona-Mantero Case (1976)

Already in 1976 it was decided that it was illegal for a football federation to impose on clubs the restriction to employ EU nationals.

A provision of the Italian Football Association stated that only players belonging to the association as professionals or semi-professionals could take part in games, but that, in addition, only players of Italian nationality can be admitted as members into the association.

The decision of the CoJEC established that such a national regulation is incompatible with Articles 7 and 48 of the EC Treaty. Nevertheless, reference is made to “non-economic reasons” and the “special nature” of certain matches (games of the national teams), which justify the exclusion of foreign players.

4.1.1.5 Bosman Case (1995)

The relevant part of the Bosman case, in the light of this assessment, is the abolition of the so-called “3+2 rule”.

Before the Bosman judgment clubs in the EU were only authorized to use 5 foreign players of which 3 needed to be EU players. In the Bosman judgement the European Court of Justice (ECJ) argued and decided that this situation was contrary to article 48 of the EU Treaty.

4.1.1.6 Kolpak Case (2000)

Maros Kolpak, a Slovak national, is the goalkeeper of the second division handball club TSV Ostringen in Germany. He is in the employ of the club and he concluded his first contract with them in March of 1997. This contract was to expire on 30 June 2000, but was renewed in the interim to be valid until 30 June 2003.

Kolpak is a foreign player in the German competition. As a result and in accordance with the regulations of the German Handball Federation (hereinafter: DHB) his players’ permit or licence is marked with the letter A. This letter is used to indicate players who are not nationals of an EU/EEA Member State and are not otherwise entitled to equal rights compared to EU/EEA nationals. One of the rights in question is to participate in the free movement of workers. Article 15 of the DHB regulations⁵⁶ states that clubs in the Bundesliga or Regionalligen are only allowed to line up two players with A-licences per competition match.

Kolpak argued that he belonged to the group of third-country nationals who are entitled to the same freedoms as EU nationals. He claimed that for this reason his players’ licence should not be marked “A”. In addition, he should not be hindered in the performance of his work by the fact that only two A-licensed players are allowed to be lined up. The Court found in favour of Kolpak.

In its reasoning, the Court applied the following arguments. Kolpak is a Slovak national. Slovakia has concluded a treaty with the EU termed an association agreement. This association agreement entitles Slovak nationals to treatment that is equal to that of the nationals of the Member States in whose territory they reside. This equal treatment concerns working conditions, remuneration and dismissal.

This provision, Article 38 of the association agreement between the EU and the Slovak Republic, applies when the Slovak national in question has legally concluded an employment contract with an employer residing in the territory of a Member State.

The Court further held that in the case of professional footballers, participation in competition matches forms part of their working conditions. Moreover, Article 38 of the association agreement is directly applicable and Kolpak and his club are addressees of the Directive, as Kolpak is lawfully employed by his club in the territory of Germany, which is an EU Member State.

The Court thus concluded that Article 38 of the association agreement between the EU and the Slovak Republic is directly applicable. A rule of a sports federation restricting the number of players who are not EU or EEA nationals is void when, contrary to Article 38 of the association agreement, the worker in question is discriminated against as compared to national workers.

The consequences of this conclusion are not restricted to players from Slovakia: the EU has concluded similar agreements with 22 other countries. These 22 countries are: Poland, Armenia, Azerbaijan, Byelorussia, Bulgaria, Estonia, the Czech Republic, Georgia, Hungary, Kazakhstan, Kirgistan, Latvia, Lithuania, Moldova, Romania, Russia, Slovenia, Ukraine, Uzbekistan, Tunisia, Algeria and Morocco.

The principles of the Bosman judgment, where it was held that there was discrimination when a club applied a limit to the number of EU players, as of Kolpak applies to another 23 countries. For clarity's sake I should add that this involves equal rights with respect to EU Member State nationals. The association agreement, and thereby the judgment, does not create rights concerning the cross-border movement of workers within the EU.

4.1.1.7 Simutenkov Case (2005)

In the Simutenkov case there existed a similar situation as in the Kolpak Case. Simutenkov is a football player that played for Celta de Vigo in Spain.

The Spanish football federation adopted a rule that limited the eligibility of non-EU players for clubs participating in the Spanish football competition.

The conditions of Simutenkov were to a large extent similar to those of Kolpak: Simutenkov was lawfully employed in Spain and from one day to another he was unable to perform the duties of his contract due to the restriction based on association law. As has been made clear above, there exists an EU partnership agreement between Russia and the EU containing the same conditions regarding non-EU workers as the association agreement between Slovakia and the EU.

The relevant article of the EU – Russia partnership agreement is article 23 (1):

“...establishes for the benefit of Russian workers lawfully employed in the territory of a Member State, a right to equal treatment in working conditions of the same scope as that which, in similar terms, nationals of Member States are recognised as having under the EC Treaty, which precludes any limitation based on nationality...”

The conclusion was therefore that Simutenkov needed to be lined up in order to be able to carry out his work.

4.1.1.8 Synopsis EU case law

The case law of the European Union clearly shows the current attitude of the European Union (ECJ / EC) towards the relation between “sporting rules” and EU law: EU law prevails over association law, a sports governing body is unable to restrict the participation of non-nationals of the specific members state whenever sports is an economic activity. EU nationals may not be discriminated and no limitations may apply to the eligibility of these players for professional football clubs. Whenever a third-country national has concluded a valid contract with a professional football club he may not be discriminated in the case that a partnership agreement or association agreement is in force between his country of origin and the EU that includes a non-discrimination clause. These type of agreements cover more than one-hundred countries because these clauses cannot only be found in the association and

cooperation agreements with third countries but also in the Cotonou agreement between the EU and the Africa / Caribbean / Pacific (ACP) countries.

It is therefore clear that it will be very difficult for UEFA to introduce the home grown player rule in the current legal framework in which professional football currently finds itself. Hence, professional football is an economic activity thus EU law is fully applicable. On the other hand, a possible justification is that UEFA intends to introduce the home grown player rule to preserve a “level playing field”. Because if clubs are not allowed to “buy” the best players because they cannot let them play under the new regulations, the starting point for the collective of clubs would be more “fair” due to the fact that the clubs could try to get the most out of their talents. The preservation of a level playing field is a legitimate goal, but in order to preserve a level playing field an assessment of the current situation is needed.

4.1.1.9 Level playing field

That leads to the question if there currently exists a level playing field in relation to the access of the best players. For the EU territory there are no boundaries, except maybe for the transitional periods which exist in some EU member states as regards to the 10 new member states. There is therefore equal access to EU players, but what is the situation with the accessibility of non-EU players?

It is clear that professional sport is an economic activity that takes part in the internal market of the EU, therefore clubs need to have equal access to the best players.

In order to assess the existence of a level playing field we will do a brief case study.

Generally regarded as the best football nation of the world is Brazil. Brazilian football players are spread out over the world: in 2004 no fewer than 857 Brazilian football players left the country to play abroad.

In order to find out if there is a level playing field as regards to the equal accessibility of professional football clubs to the employment of a 20 year old Brazilian football player we will clarify what are the conditions for the employment of this specific Brazilian talent in the Netherlands and briefly compare it with other countries.

4.1.1.10 Netherlands

In order to be able to employ a 20 year old Brazilian football player a Dutch professional football club needs to organize a work permit for this player.

There are three important specific criteria for employers in football. These are the income criterion, the quality criterion and the contingency principle.

In professional football, the income criterion and the age criterion are the most objective of all the criteria used by the Centrum voor Werk en Inkomen (CWI), the governmental bureau for work and income. In the past, employers had to explain to the authorities with no grounds specified why a foreign player was considered more suitable than a Dutch player. With the establishment of the income criterion the employer no longer needs to have this discussion. If the employer is prepared to pay the player a minimum salary that has been established beforehand this will indicate that the player is considered suitable to play for the club. Further interference from the authorities concerning the ins and outs of this suitability does not take place.

The income criterion is established annually by the CWI in accordance with the average gross annual income in the Premier League in the previous season. The salary information is supplied by the KNVB (Royal Dutch Football Association). Employers in football have to be prepared for changes in the income criterion around February of each year.

For non-EEA players the following remuneration is regarded as being in accordance with the market:

The guaranteed income of players aged 18 and 19 must be at least 75% of the established average gross annual income in the Premier League in the previous season;
The guaranteed income of players aged 20 and over must be at least 150% of the established average gross annual income in the Premier League in the previous season.

The criterion in calculating the guaranteed minimum income as of 1 July 2005 is €227.136 gross a year. This results in the following minimum remuneration:

players aged 18 and 19	€ 170.852,25;
players aged 20 and over	€ 340.704,50.

In determining whether the income which the employee will receive is in accordance with the established criterion the following salary components can be included in the calculation:

- The basic salary;
- Possible guaranteed premiums;
- Earnest money, apportioned as an annual component;
- The holiday allowance.

In order to be eligible for a permit the employer must be able to show, based on objective information, that the player has certain qualities.

The employer can demonstrate that the player has the necessary qualities based on one of the following two objective facts:

Just prior to his employment, the player participated in a competition which is at least as strong as the highest division of the Dutch competition. A competition is assumed to be as strong when it is the highest of a country which at the time when the work permit was applied for ranked among the top 40 countries on the FIFA country ranking list;

The player has proven in some other way to have at least comparable qualities.

This quality criterion is entirely based on the player's individual performance. The criterion has been met when the alien played in:

The national team of his country;

The Olympic team of his country;

A national youth selection of his country;

Recognised international club tournaments such as the Champions League, UEFA Cup, Copa Libertadores, etc.

The player must meet either criterion 1, or criterion 2. This is therefore not a cumulative criterion. It should also be noted that the experience may have been gained at any point during the player's career. It is therefore not necessary that this took place shortly before the application for a work permit.

It is clear that in the Netherlands it is quite difficult for a club to employ the Brazilian player, although there is no limit to the use of Brazilian players.

4.1.1.11 Belgium

The same player would also need a work permit in Belgium, although the conditions there are different. The player in Belgium would also need to have a work permit but the only requirements are that the player receives a written contract and a minimum salary which is € 60.242,00 a year.

4.1.1.12 Italy

There also exist criteria for the employment of non-EU nationals in the football sector in Italy. The player needs a work permit but is also subject to criteria issued by the sport authorities. In Italy the Olympic Committee (CONI) sets up quota for the amount of foreigners in football together with the Italian football association.

4.1.1.13 Portugal and Spain

In Portugal and Spain the football league has set up rules for the alignment of foreign players.

These criteria and quotas in Italy, Portugal and Spain are in fact not illegal because the football governing bodies have received a formal mandate from the relevant governmental authorities to draw up rules and regulations for the entry of non-EU players to the football labour market.

Therefore in these countries clubs may not align more than 2 or 3 non-EU nationals. As regards to the Brazilian player in our case study: Portugal has a bilateral agreement with Brazil which is beneficial for Portuguese clubs, they can employ Brazilians far more easy than other EU countries.

4.1.1.14 Conclusion of case study

There currently does not exist a level playing field in the EU as regards the employment of non-EU nationals. On a national level of the member states different rules apply to the employment of these non-EU nationals.

As the UEFA home grown player rule will most likely not be able to be introduced under the current framework of EU law we will assess various options to create a level playing field as this is the perspective of this contribution.

Realizing that we are dealing with the employment of third country nationals this topic falls under the unification of laws concerning foreign nationals and entrance to the national labour markets of the member states. On an EU level there has been an initiative for a directive.

4.1.1.15 Draft Directive of European Council of Tampere

At the European Council of Tampere in October 1999, the European Commission was given the mandate to draft a proposal for a directive. The title of this draft directive is: "The conditions of entry and residence of third country nationals for the purpose of paid employment and self employment activities". The legal basis of this draft directive is Article 63(3) of the EC Treaty.

The EC has indicated in a communication that it intends to take a two-tier approach to this mandate. The main objective of the draft directive is to erect a legal framework at the EU level as regards the policy for the granting of work permits. In addition, the European Commission attempts to direct this uniform legal framework by means of an open and transparent system in the field of immigration policy at the Community level.

However, the above applies to a general policy. The EC recognises that certain specific categories of employees may be given separate treatment. One of these categories is that of professional athletes.

If professional would be mentioned in this directive there would be a possibility to introduce harmony in European football and to underline the exceptional position of the football sector.

What could be football specific topics to be included in a possible directive that would lead to the creation of a level playing field and would be in line with the UEFA home grown player rule?

Characteristics of uniform European rules

The directive has to include a provision serving to protect youth training. This will preserve the lifeline of European football and emphasise the grass-roots level of the sport.

The permit should further apply for a fixed number of years for one employer only. This way, the stability of contracts is retained and trade in players prevented.

A possibility to introduce minimum harmonisation by means of open wording is to establish a maximum number of non-EU players which a club may employ. This would result in a European quota system. The quota would serve to prevent the forced resignation of national employees. Furthermore it should ensure that the amount of remuneration does not differ too much from one player to the next.

Clubs must be able to employ a non-EU player in contingencies. The conditions for this must, however, be objectively determinable. One could think of a situation where in mid-season a club suddenly needs a player for a specific position and because of circumstances is only able to find such a player in a non-EU country. For such cases a wild-card system could be introduced.

Finally, a ceiling could be put on the number of permits per club. This way allocations of work permits become valuable in money. Clubs that do not contract any non-EU players can sell their permits on. This is especially advantageous to smaller clubs as it creates business opportunities and benefits a level playing field.

4.1.1.16 Stakeholders

The EC must take the initiative for such uniform rules in a draft directive. Therefore, an EC organisation will probably wish to launch a dialogue with the sport sector. However, this is the crossroads between labour law, aliens law and sport. Two observations should be made here.

First of all, in accordance with established policy of the European Commission, it is self-evident that federations are not competent where labour law or aliens law are concerned. Secondly, the EC has no direct authority where issues of sport are at stake; for this, it lacks a treaty or statutory basis.

This leads to the conclusion that there is a gap between the EC and the federations, which could, however, be filled by management and labour. This is actually a logical step when one considers that e.g. in the Netherlands and Spain management and labour are involved in determining the criteria for the employment of non-EU players.

Stakeholders in this discussion therefore are: the EC, national governments, federations, clubs and players.

4.1.1.17 Conclusion

The starting point for this assessment was the UEFA home grown player rule: preserving the level playing field and encourage talent and youth development. After that we concluded that the UEFA proposed rule would be difficult to implement. Besides that we stressed the fact that currently there does not exist a level playing field in the EU as regards the accessibility clubs to the best non-EU talents.

A possible solution to introduce a sort of home grown player rule is by creating an EU wide directive, after consultation of the relevant stakeholders, dealing with the accession to the EU labour market in sport.

Or, another possibility, which is less likely, is to create an exemption for sport and leave the authority to regulate this matter to the sporting world (associations) themselves.

Finally, as we are talking about labour law matters, a good instrument to involve the relevant stakeholders could be the Social Dialogue.

A uniform regulation on the accessibility of clubs to the best talents could be beneficial but what needs to be taken into consideration is the authority of members states to regulate their own employment market. This must be considered next to the advantages to create a level playing field for clubs and players and the prevention of abuse of players and fraudulent activities such as passport falsifications.

4.1.2. Use of fixed-term contracts in sports with the focus on football

4.1.2.1 Introduction

Due to historic and sporting reasons – a specific competition lasts only a part of the year- a contract between a player and a club is in the far majority of the cases a contract for a fixed-term.

After the Bosman case the use of fixed-term contracts in professional football became the source for an alternative transfer system. Due to the Bosman judgement it became illegal to demand a payment for the transfer of a player after the expiry of the contract between a player and his club. The alternative transfer system banned the payment of transfer fees and created the entry of payments of damages for preliminary breach of contracts.

In practice, players and clubs concluded contracts for a fixed-term but, if the player was a talent and an asset for his club, he would not reach the end of his contract. The fixed-term contract would be renewed and in case that there would exist interest from another club to “buy” the player, the fixed-term contract would be breached and a payment of damages for the breach of the contract was deemed to be paid to the “selling” club.

4.1.2.2. Sporting rules

In the regulations of various international sports federations there exists a specific clause relating to the duration of the contracts. In the case of Basketball the international regulations of the international basketball federation (FIBA) state that a contract should have a fixed duration between 1 and 4 years. In international Ice Hockey no timeframe is given, the regulations of the International Ice Hockey Federation (IIHF) state that the contracts need to be of a specific duration. In the FIFA regulations it is stated that a contract needs to have a minimum duration of 1 year and a maximum duration of 5 years.

The FIFA regulations for the Status and Transfer of Players, recently adopted in July 2005, contain far-reaching and important consequences for football, and thus for the entire professional sports sector in Europe.

4.1.2.3. Contractual Stability and the existence of an alternative transfer system

An important aspect in the FIFA transfer regulations is the need to ensure contractual stability in international football. The FIFA regulations dealing with contractual stability intend to strike a balance between the respective interest of players and clubs and preserve the regularity and proper functioning of sporting competition.

The new regulations stipulate that unilateral termination of contracts during the first three years should be discouraged for players under 28 years and during the first two years for players over 28 years of age.

A breach of a contract in the stability or protected period may only occur after a just cause – reasons for preliminary breach of a contract for a definite time according to the national law of the state on whose territory the breach occurs – or sporting just cause.

The existence of sporting just cause is decided on a case-by-case basis, taking account of all relevant circumstances such as injuries, suspension, field position of players, age of players, etc.

The introduction of the contractual stability clauses in the FIFA transfer regulations serves as an evidence for the existence of an alternative transfer system based on the preliminary breach of fixed term contracts. We will now assess the existence of EU law or official EU communications that relate to this topic.

4.1.2.4. European Commission Statement of Objections 14 December 1998

The European Commission DG Competition issued a statement of objections in 1998 against the FIFA transfer regulations. This occurred after the Bosman case. The statement was made after a complaint by a Belgian trade

union, the Syndicat des Employés Techniciens et Cadres). The complaint was raised against the (after Bosman) modified FIFA transfer regulations. In the view of the trade union there was still an infringement in force of EC Treaty articles 45 and 85.

One of the aspects that was considered by the European Commission in the statement of objections was the fact that the ECJ did not decide upon the remuneration that was deemed to be paid due to a preliminary breach of a fixed-term contract. The European Commission made the following objections.

The FIFA regulations after Bosman were still a restraint in the free competition. The clubs made an agreement not to obtain players without the payment of a remuneration. This remuneration was maintained relatively high, by far exceeding the actual costs for training and education of the players. This agreement, which can be characterized as a gentlemen's agreement, is in fact a cartel and is prohibited. The competition between clubs could not only take place based upon the amount of the salary and the conditions of employment.

The European Commission considered to judge that the FIFA transfer system was still against the free competition, even after the Bosman case. The mid-contract breach transfer system needed revision by the FIFA.

When in 2001 the revised FIFA transfer regulations finally came into force, after long negotiations the EC finally agreed upon the modifications made by FIFA, the above-mentioned alternative transfer system was not excluded, and still isn't until today.

4.1.2.5. Directive 1999/70/EC

Based on a framework agreement between the co-ordinating European social partners in Europe, the UNICE, CEEP and ETUC, Council Directive 1999/70/EC came into effect from June 28, 2000. The contents of this directive will first be considered, followed by a discussion as to why it can influence the fixed-term employment contract between a player and his club.

The directive specifies a general framework within which equal treatment of employees with a fixed-term contract has to be guaranteed in relation to employees with a contract of an indefinite duration. It is intended to protect the employees with a fixed-term contract against discrimination and to offer them legal security.

The directive contains general principles and minimum requirements for fixed-term employment contracts.

The directive applies to fixed-term workers who work by virtue of an employment contract or some kind of employment relationship as stipulated by law, a collective employment contract, or custom in each member state. It can be determined that the directive is not applicable to training contracts or when in training, or in employment contracts drawn up within the framework of a training and work adaptation and retraining programme.

According to the directive, discrimination against employees with a fixed-term employment contract can be counteracted by preventing abuse through the use of successive fixed-term employment contracts.

This is why the member states are obliged to implement one or more of the following measures:

- Objective reasons justifying the renewal of fixed-term employment contracts;
- Determining the maximum allowed total duration of successive employment contracts;
- Determining the total number of times that such agreements are allowed to be renewed.

These are the main criteria which influence the employment contract between a player and club in professional football. Every member state is obliged to implement them in their national legislation.

4.1.2.5.1 Consequences of the directive for the employment contract between the player and club

Council Directive 1999/70/EC determines that a number of agreements do not fall under this provision. Sports employment contracts are not excluded in the directive. The directive considers football players to be employees. Employment contracts in European football are fixed-term contracts because the club regulations specify this and because it is seasonal work. The directive is therefore fully applicable to professional football in Europe.

This means that fixed-term employment contracts between players and clubs will also have to meet the requirements stated in the directive.

The directive indicates that the normal working relationship between the employer and employee is an employment contract for an undefined period of time and will remain as such. At such time as the fixed-term employment contract does not meet the requirements which have to be implemented by the member state, then this contract will be converted into an employment contract of an indefinite duration.

Should the fixed-term employment contract change to an employment contract of an indefinite duration, then the basis for payment of a fee if the player is transferred to a new club will lapse. As mentioned above, this compensation is purely a redemption fee for contracts for a specific period of time.

In the Netherlands, for example, an employment contract of an indefinite duration can be terminated by the employee, with consideration for the legally stipulated notice period. If the player comes to the conclusion that his contract with the club has become an employment contract of an indefinite duration, then he may terminate the employment contract. After the expiry of the stipulated period of notice, his contract has officially ended. The Bosman judgment has determined that no compensation may be paid if a player was at the end of his contract.

Council Directive 1999/70/EC can thus have far-reaching consequences for European football. The question is how the member states took this into account when implementing the directive? The directive offers member states and social partners the possibility of using, or continuing to use, certain parts of the employment contracts for a specific period of time.

4.1.2.6. Conclusion

The FIFA transfer regulations intend to regulate to a certain extent the use of fixed term contracts in football. These contracts are the basis for the current transfer system in the EU.

On the level of the member states there are regulations dealing with the use of fixed term contracts. These are statutory provisions which prevail over FIFA regulations.

The FIFA regulations could be in conflict with national laws of the member states regarding this matter. The existence of the current alternative transfer system could therefore be based on a set of rules that cannot be enforced.

The conclusion of this assessment in relation to the current FIFA transfer system could be the following.

- Overall exemption for FIFA in relation to the drafting of the transfer system on the basis of the specificity of sport.

This is difficult to obtain due to the fact that national employment legislation does not fall under exemptions granted on an EU level and that individual differences will remain to exist in the national member states.

- Total abolishment of the aspect of mid-contract breaches in EU football (alternative transfer system) by the European Commission.
- Exemption for sport in the fixed-term directive, on the initiative of the overall EU social partners;
- Continuation of the persuasion by the European Commission to introduce a social dialogue in European professional football in order to regulate the matter of the fixed-term contracts in a framework agreement.

4.1.3. Sport Agents in the European Union

4.1.3.1. Introduction

The use of sport agents in the European Union became more widespread after the Bosman judgement. From that moment on players were able to better plan their careers as they became “free agents” after the expiry of their contracts. The affairs connected to this new status were managed by sport agents.

These affairs are not only the placement of talents at clubs but may consist of managerial duties such as all contract negotiations, public relations, financial management, etc.

Although the occupation of agent has become more professional in the recent years there still exists a somewhat stained reputation of the agent in general. This has mainly to do with incidents in which agents have been involved and that dealt with fraud, excessive fees and the abuse of young players. Various actors in the international football world have tried to regulate in a way the profession of a players’ agent. Below we will outline the various frameworks of regulation of the players’ agent activities until now.

4.1.3.2. Sporting Rules

In football the FIFA Players’ Agent regulations are applicable to agents. The regulations provide a framework for agents, players, clubs and associations to work with each other.

Player agents need a license issued exclusively by FIFA to become an agent. Clubs and players are only able to work with the so-called FIFA licensed players’ agents, or actually nowadays it is the national association of the agent that issues the license. A parent, a sibling or a spouse of the player may perform the task of an agent without a license, nor does a lawyer or a recognised players’ association.

The licenses are issued by the National Football Association twice a year after a rigid examination.

Furthermore, the player agent needs to conclude a written representation contract with a player of a club that may not exceed the duration of two years. He may contact any player who is not or is no longer under a contract with a club, represent any player or club that requests him to negotiate on his / its behalf and defend the interest of any club or player that requests the agent to do so.

The contract of the players’ agent need to stipulate exactly who will pay and how much will be paid as a remuneration for the agents’ services.

In the case that a specific clause lacks in the contract a average fee of 5% of the basic income that a player will receive. From the side of the club now figures are given to decide upon the payment of the fee.

According to the FIFA regulations it is compulsory for a players’ agent to sign a Code of Professional Conduct and to use a standard representation contract.

Another aspect that was introduced in the FIFA agent regulations was the necessity for player agents to conclude a professional insurance.

These player agent regulations did not appear without any difficulty. The rules have been under scrutiny in the past decade and are currently the topic of an appeal before the ECJ.

4.1.3.3. European Commission Influence

After a number of complaints and two petitions from the European Parliament the European Commission decided to investigate the Agent Regulations.

The European Commission officially informed FIFA that it considered the FIFA Agent Regulations to be anti-competitive agreements. The regulations prevented or restricted that natural persons with the relevant skills and qualifications would have access to the profession of players' agent. FIFA argued that the rules that they unilaterally had drafted were beneficial for the profession.

The main concerns of the European Commission were the ban on clubs and players in using the services of non-licensed agents; the ban on undertakings being licensed as players' agents and the mandatory payment of a non-returnable bank guarantee of CHF 200,000.

The only aspect that was reviewed, as has been made clear above, was the mandatory bank guarantee. A professional insurance was introduced instead. After long negotiations the FIFA and the European Commission reached a compromise. FIFA was allowed to regulate the profession of players' agent based on objective and transparent criteria.

4.1.3.4. Piau Case

On January 26 the European Court of First Instance decided upon an appeal of a decision of the European Commission in the so-called Laurent Piau Case. Laurent Piau is a Players' Agent that issued a complaint to the European Commission related to the FIFA Players' Agents regulations.

Piau's initial complaint and the starting point for further litigation, on the 23rd of March 1998 focussed on the content and objectives of the FIFA Players' Agent regulations and their incompatibility with the articles 49 and further of the EC Treaty. Piau was against the fact that a license is compulsory in order to carry out the profession of an players' agent. He reacted upon the necessity to pass a written exam before being able to receive such a license. In addition to that he complained against the necessary financial deposit that a (starting) players' agent needed to make as a sort of insurance; against the power to sanction from the side of the FIFA and against the fact that the FIFA Players' Agents Regulations did not foresee the possibility to appeal in court against a sanctioning or decision by FIFA.

The European Commission received the complaint and intervened. The European Commission made the abovementioned grievances clear to FIFA in a statement of objections. FIFA then changed their regulations in such a way that the European Commission authorized the use of the renewed FIFA Player's regulations and their compatibility with European Union law. FIFA abolished the compulsory deposit of a serious amount of money and introduced the conclusion of an insurance instead. In addition to that, FIFA introduced a code of conduct; a model-contract for players' agents and a method for calculation of the fee deemed to be paid to the agent.

Piau, however, upheld his complaint and sought a decision from the European Commission on the 28th of September 2001. He included in his complaint the restrictive aspects of the code of conduct, the model-contract and the fee calculation method.

The EC, however, acted upon this complaint as if it were related solely to an action based on resolution nr. 17. Hence, only making it possible to approach this complaint from a competition law perspective or more specific: using the perspective based on article 81 of the EC Treaty.

The European Commission decided upon the legitimacy of the FIFA Players' Agents Regulations. Contrary to what Piau stated, the European Commission did not believe that the renewed FIFA Players' Agent regulations were contrary to article 81 of the Treaty.

Piau appealed to the European Court of First instance (CFI). The CFI upheld, in most aspects, the decision of the European Commission. In its judgement, the CFI decided upon the rule making action of FIFA and the compatibility of the FIFA Players' Agents regulations as regards to competition law. It concluded as follows:

“Thus the need to introduce professionalism and morality to the occupation of players' agent in order to protect players whose careers are short, the fact that competition is not eliminated by the licence system, the almost general absence (except in France) of national rules, and the lack of a collective organisation of players' agents are circumstances which justify the rule-making action on the part of FIFA.

Possible abuse of a dominant position by FIFA

The Court of First Instance disagrees with the Commission and considers that FIFA, which constitutes an emanation of the clubs, thereby holds a dominant position in the market of services of players' agents. Nevertheless, the FIFA regulations do not impose quantitative restrictions on access to the occupation of players' agent which harm competition, but qualitative restrictions which may be justified, and do not therefore constitute an abuse of FIFA's dominant position in that market”

Lauren Piau was not satisfied with this decision and went in appeal. The appeal is currently being assessed by the ECJ.

4.1.3.5. The legal status of agents under International Law

The FIFA definitions define the activities of the agents as “a natural person who, for a fee, on a regular basis introduces a player to a club with a view to employment or introduces two clubs to another with a view to concluding a transfer contract”.

On an international level there is a specific ILO Convention which is applicable to the work of players' agents. The International Labour Organization is the UN specialized agency which seeks the promotion of social justice and internationally recognized human and labour rights. It was founded in 1919 and is the only surviving major creation of the Treaty of Versailles which brought the League of Nations into being and it became the first specialized agency of the UN in 1946.

The ILO formulates international labour standards in the form of Conventions and Recommendations setting minimum standards of basic labour rights: freedom of association, the right to organize, collective bargaining, abolition of forced labour, equality of opportunity and treatment, and other standards regulating conditions across the entire spectrum of work related issues.

The ILO has issued a Convention in 1997, C181: Private Employment Agencies Convention. One part of article 1 of this Convention point out the scope of these regulations: Private Employment Agencies means any natural or legal person, independent of the public authorities, which provides one or more of the following labour market services: services for matching offers of and applications for employment, without the private employment agency becoming a party to the employment relationships which may arise there from.

According to the definition of a FIFA Players' agent it is clear that this profession falls under the scope of the ILO Convention C181. I will reflect on the relevant content of this Convention in light of the research.

The Convention is applicable to every economic activity and all categories of workers, except seafarers. The purpose of the Convention is to allow the operation of private employment agencies as well as the protection of the workers using their services. Restrictions of on the freedom of performing as a private employment agency can only be introduced by the Members and after consulting the relevant and most representative organizations of workers and employers.

The Conventions sums up the following possible restrictions: prohibition of operating in a certain branch of economic activity, exclude certain workers or part of workers from the scope of the Convention, provided that adequate protection is otherwise assured for the workers concerned. Any of these restrictions need to be reported to the ILO under the communication of the reasons for these restrictions.

If a system of licensing or certification is introduced to govern the operation of private employment agencies, the only authority which is able to do so is a Member. Here it also applies that a Member needs to do that after consulting the relevant representatives of workers and employers. An exception can be made if based on national law and practice.

The Convention safeguards the protection of the workers by ordering respect as regards to the workers rights on privacy, freedom of association, collective bargaining, prevention of abuses deriving from international recruitment and placement and the prevention of child labour.

An interesting aspect of the Convention is the fact that it is forbidden for private employment agencies to charge directly or indirectly any fees to the workers. This may (again) only change after consulting the relevant most representative organizations of employers and workers. This is a direct and sever conflict with the FIFA regulations.

It can be concluded that countries which have ratified this Treaty safeguard the quality of the profession of private employment agencies and the protection of the workers. If there is a lack of regulation concerning private employment agencies then the ratification of the Convention will serve as a “net”.

In the member states of the EU there also exists national legislation concerning sport agents or private employment agencies in general.

4.1.3.6. Conclusion

For future European interventions on the topic of players’ agents the following needs to be taken into consideration.

The FIFA lacks in principle the authority to unilaterally draft the regulations due to the fact that no formal mandate is given to FIFA to do so and that FIFA has as its members the national associations and not the agents;
International law is applicable to the profession of agents which prevails over the FIFA regulations;
On the national level of the member states specific legislation is in force regulating the profession of player agents;
There is no “rule of reason” for FIFA to regulate the profession of agents on the basis of the specificity of sport.

In the near future there will be a decision in the Piau appeal. The question is if the ECJ will uphold the decisions of the Court of First Instance. In the meantime, what can be expected is a lobby by the agents, organized collectively in the IAFA. This organisation needs to be heard in the discussions concerning player agents due to the fact that the agents are in fact “private employment agencies”.

Another aspect that needs consideration is that the agents provide services and would fall under the proposed service directive. This would mean that any agent being able to perform the services on the national level of a member state is able to perform in the entire EU, regardless of the FIFA regulations.

In order to prevent future implications it would be possible to pursue the relevant parties to negotiate a code of conduct and regulations which are formally enforceable. A connection to the existing regulations of private employment agencies is preferable.

4.1.4 *Diploma's: The Recognition of Sports Qualifications*

4.1.4.1 *Introduction*

In a sporting context, EU free movement rules are most frequently applied to athletes such as cyclists, football players, judokas, basketball players, handball players and swimmers.¹ Nevertheless, for a sporting context to take place a much wider range of individuals will be involved. This includes physiotherapists, coaches, dieticians, psychologists, trainers and instructors. As established elsewhere in this report, EU citizens enjoy rights of free movement in the field of labour mobility, service provision and the right of establishment. It is normal and appropriate for member states to impose restrictions on foreign nationals wishing to take up employment. For example, the individual in question would be expected to be suitably qualified. However, the lack of a suitably robust system for recognising qualifications gained throughout the EU could inhibit the exercise of the right to free movement – hence the EU has an interest in this field. In instances whereby qualifications are not awarded by bodies within the member state, member states are under an EU obligation to recognise equivalent qualifications gained in other member states.

For some professions the EU has established specific mutual recognition standards. These sectoral Directives which provide for automatic recognition of professional qualifications are mainly confined to the health sector. Occupations covered include doctors, nurses, dentists, midwives, veterinary surgeons, pharmacists and architects. The sports profession, and many others, are not covered by these sectoral Directives. An alternative approach to mutual recognition was established by the EU through the initial adoption of two ‘general system’ Directives which culminated in the adoption of a third, Directive 99/42.¹ These Directives cover all professions not included within the scope of the sectoral Directive, thus they apply to sport. The legislative framework covering mutual recognition of qualifications means that if an individual possess the necessary qualifications to practice their profession in their member state of origin, then they are deemed to be so qualified to practice in the host state. This does not prevent a member state from requiring the applicant in question to undergo an adaptation period (such as a period of supervised training) or take an aptitude test when there are substantial between the training received in the host state and that required on its territory. The choice lies with the applicant. See also section 4.1.1.15 Draft Directive European Council of Tampere.

4.1.4.2 *Football Trainers*

The Heylens case preceded the adoption of the general Directives.¹ It concerned a French requirement that in order to be a football trainer in France a person must be the holder of a French football-trainer's diploma or a foreign diploma which has been recognised as equivalent by the French government. George Heylens, a Belgian national, trained the Lille Olympic Sporting Clubs football team, a French club. His application for recognition of a Belgian diploma was rejected by the French Ministry of Sport. In the statement of reasons, the Ministry referred to the negative opinion of a special committee. However, the special committee gave no reasons for their negative opinion. The French football-trainers' trade union (UNECTEF) prosecuted Heylens and the directors of the football club before the Lille Criminal Court because of his continued employment with the club. The question of the compatibility with EU law of the French system for deciding on the equivalence of diplomas law was referred to the ECJ.

The ECJ referred to the fundamental right of workers to move freely within the EU. In this connection, the ECJ reiterated that member states must take all appropriate measures to ensure the fulfilment of the obligations arising from the Treaty. Nevertheless, the ECJ held that in the absence of harmonisation of conditions of access to a particular occupation, the member states are entitled to lay down the knowledge and qualifications needed in order to pursue it and to require the production of a diploma certifying that the holder has the relevant attributes.¹ However, the ECJ held that a decision refusing to recognise the equivalence of a diploma must be reviewable to see whether it is compatible with Article 39 and to allow the person concerned to ascertain the reasons for the decision.

4.1.4.3 *Ski Instructors*

The issue of the ability for applicants to prove their abilities came before the Commission in 200/01. The European Commission has received requests from France, Italy, Austria and Germany seeking derogations from aspects of Directive 92/51. As explained above, the Directive allows a member state to require the applicant in question to undergo an adaptation period or take an aptitude test when there are substantial differences between the training received in the host state and that required on its territory. The choice between the adaptation period and the aptitude test lies with the applicant. The states involved requested derogation to remove the choice and insist on aptitude tests for ski instructors from other member states. This was defended on the safety grounds relating to the particular conditions in the states. The derogations were granted.¹ The derogations also applied to French parachuting instructors, Italian, Austrian and German mountain guides and Austrian and German ski tour guides.

4.1.4.4 *Conclusions*

The right of EU citizens to circulate freely within the EU would be inhibited if there was not a suitably robust system ensuring mutual recognition of qualifications. In *Heylens* the ECJ found that a decision refusing to recognise the equivalence of a qualification gained in another member state must be reviewable in order to assess its compatibility with Article 39. In the *Ski instructor's* decisions, the Commission granted derogations from Directive 92/51 thus permitting the member states in question to insist on aptitude tests for ski instructors from other member states rather than the period of adaptation. One possible way forward for sport would be to adopt European level diplomas and/or adopt common standards through a collective bargaining agreement facilitated by Articles 137-139 EC.

4.2 Professional Sport and competition law issues

4.2.1 *Introduction*

4.2.1.1 *Themes*

When the former EU Commissioner for Competition, Karel van Miert, (former President of the Directorate General of Competition) left the European Commission in September 1999 “more than fifty sports cases or cases concerning sports were still pending.”⁵⁷ Most of these cases involved complaints by competitors or other relevant parties.⁵⁸ Since that date the European Commission and the European Court of Justice have been applying competition law to the sports sector with increasing frequency⁵⁹. Both institutions investigate “on a case-by-case” basis whether sports regulations or practice must make place for competition law.

By shedding some light on highly divergent topical themes, we will endeavour to expose the area of tension between professional team sport (football) and competition law. Because the themes encompass too many aspects for an in depth research, we will therefore focus on the most striking dimensions and issues.

The following themes will be discussed:

A. Rules of purely sporting interest, outside the scope of 81 (1)

Selection criteria

Nationality clauses

⁵⁷ Karel van Miert, *Mijn jaren in Europa*, Lannoo, Tielt, 2000, p. 158.

The Commission is empowered by the Treaty to apply these prohibition rules and enjoys a number of investigative powers (inspection of business and non-business premises, written requests for information...) to that end. It may impose substantive fines for violations. Since 1 May 2004, all national competition authorities are also empowered to apply fully the provisions of the Treaty in order to ensure that competition is not distorted or restricted. National courts may also apply these prohibitions directly so as to protect the individual rights conferred to citizens by the Treaty.

⁵⁸ Karel van Miert, *Mijn jaren in Europa*, Lannoo, Tielt, 2000, p. 158.

⁵⁹ Helsinki Report, Brussels, 1 December 1999, Com (1999) 644. and compare. e.g. Monti, "Sport and Competition: Excerpts of a speech given at a Commission-organised conference on sports Brussels", 17 April 2000. And compare. Alexander Schaub "EC Competition Policy and its Implications for the Sports Sector", World Sports Forum, 8 March 1998, St Moritz, and K. Van Miert "Sport et concurrence: Développements récents et action de la Commission", Forum Européen du sport, 27 November 1997, Luxembourg;

Other 'rules of the game'

Doping rules

B. Sporting rules and legitimate aims, outside the scope of 81 (1)

Transfer period

Home and away-rule

Playing home match in the opponent's country

Multiple ownership of clubs

C. Restrictions in the players market

Transfer regulations (regulations concerning the transition of a player to another club; internal relationship between player, club and league association);

D. Restrictions in the exploitation market

Television rights (regulations concerning the sale of television rights by the clubs and the league association jointly; regulations which have an impact on the interests of third parties (media enterprises))

Ticketing

E. The formation of a new league (break-away leagues)

E. Licensing

Clubs

Player's agents

F. State aid (financing of professional sports clubs by the government; relationship between club and government).

4.2.1.2 *Competition is a good thing*

Western economies adhere to the maxim that competition between enterprises is a good thing. The fact that less effective enterprises fall by the wayside in the race of the survival of the fittest is all in the game. The EC Treaty and national legislation in the Member States therefore provide rules that must guarantee competition in the common and national market. In Europe those rules apply both to (private) enterprises and to Member States, including non-central authorities. The rules form a necessary condition for realizing the objective of the European Community, a common market (Articles 2 and 3, EC Treaty)⁶⁰.

4.2.1.3 *Relevant competition laws*

The underlying principle in European competition law⁶¹ is the prohibition of cartels (article 81, EC Treaty) with reference to which most sports regulations are tested. These provisions are understood to involve a general ban on agreements that restrict competition between undertakings. A negative clearance from the prohibition may be obtained under European competition law pursuant to article 81, Paragraph 3 of the EC Treaty if the positive effects of the agreements, such as the improvement of production or the distribution of products outweigh the negative effects of the agreement⁶². If this condition is not met, the agreement or the decision is automatically void by operation of law (Section 81, Paragraph 2, EC Treaty). Article 82 prohibits any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it, in so far as it may affect trade between Member States.

In addition to cartel legislation, the EC Treaty contains Section 87, which states in general terms that state support that may falsify competition within the Community is in principle incompatible with the common market and is (implicitly) prohibited⁶³.

60 Case 36/74 [1974] E.C.R. 1405; [1975] 1 C.M.L.R. 320, para 4. "sport is subject to Community law only in so far as it constitutes an economic activity within the meaning of art. 2 of the Treaty".

61 Section 81 of the EC Treaty (ex Section 85)

The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by leagues of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market (...)

62 2000/0243 (CNS), Com (2000)def.,

63 Compare Case 78/76 Steinike v. Germany 1977

4.2.1.4 *Sports agreements and their relation to competition law*

The private law hierarchy of standards in the traditional sports organization is characterized by a “monopolistic” pyramid structure that involves a regulatory framework of coordinating league associations. The sports community is both subordinate to the hierarchical legal system but to a certain extent also coordinate to the legal system in the sense that the sports organization claims its own place within the legal system. One of the main questions is to what extent the sports organization is autonomous in establishing its own rules, and at which point legal rules including competition rules, penetrate this autonomous system.

4.2.1.5 *Community level and the recognition of special characteristics*

At the Community level “the social, educational and cultural functions inherent in sport and making it special in order that the code of ethics and the solidarity essential to the preservation of its social role may be respected and nurtured” are recognised⁶⁴. All these worthy aims mostly concern the non-economic side of sport, while competition law by contrast is concerned with the distribution of material wealth. Or, in the words of the European Commission: “... there must be a clear separation between sports regulation and the commercialisation of sports”⁶⁵. The question is whether there is an inextricable relationship between the intrinsic value of sports and socially virtuous values. For a phenomenon like ‘sports’ never exists in isolation but always forms part of society. In Europe professional sports are, contrary to the United States, still linked with the virtues and ideals of amateur sports. It would appear that, even in the 21st century, the views of De Coubertin, the founding father of the modern Olympic Games, are still an obstacle to fully accepting the fact that generating economic benefits is all part of sports as a form of entertainment while at the same time retaining their own identity as ‘sports’.

Within the European Community, attention is further paid to the special character of sport, more in particular, the interdependence between competitors and the need to ensure the unpredictability of competition results. For, as opposed to other undertakings in commerce, the match and the competition cannot be realised without the preparedness of other horizontal competitors (in team sports these are the clubs, in individual sports, the athletes) to compete with each other⁶⁶. This necessary interdependence of the clubs is a direct result of the demanded relatively equal strength of the competitors on the playing field, as an essential characteristic of organised competitive sport⁶⁷. In competition law terms: horizontal restraints on competition are essential if the product is to be available at all.

It is also important to note that the number of spectators on the demand side of the game is partly determined by the excitement contained in the uncertainty as to the outcome of the match or competition. This excitement among other things depends on the equal chances of teams (competitive balance), the ranking of the teams or individuals within a competition and the mutual national or local rivalry between teams or individuals (principle of locality or nationality)⁶⁸.

At first glance, these characteristics appear to justify that the production and sale of sports deserve a special approach within competition law. However, the European Commission has held that these special characteristics do not at all justify that the economic activities brought about by sport should ex officio be exempted from the application of the competition rules of the Treaty, given the increasing economic importance of these activities. The institutions of the European Community, among which the European Commission and the Court of Justice of the EC, must, however, take the special characteristics referred to into account. On a case-by-case-basis, the Court recognized some of the aforementioned characteristics as “special”.

64 Annex IV to the Conclusions of the Presidency, Nice 7-9 December 2000

65 Helsinki report, Brussels, 1 December 1999, Com (1999) 644

66 J. Quirk & R. D. Fort, *Pay dirt: the business of professional team sports*, Princeton, New Jersey: Princeton University Press, 1992, p. 243.

67 See also H.T. van Staveren, *Het Voetbalcontract, op de grens van sportregel en rechtsregel*, Kluwer: Deventer, 1981

68 In individual sports where one athlete dominates the game for a long time the sports organisation can do little to ensure the unpredictability of the results; this is different for team sports. See Sloane, 1976, p. 3.

4.2.2 Rules of purely sporting interest

4.2.2.1 Introduction

In line with the conclusion of Advocate General Lenz in the Bosman ruling⁶⁹, the European Commission states in the Helsinki Report that there is a distinction between sports rules which are inherent to the proper functioning of the sector (e.g. the ‘rules of the game’) and which may therefore fall outside the scope of competition supervision and sports rules which do not fit into this category and for which only the positive effects of the competition restraint can be taken into account when considering possible grounds for an exemption pursuant to Section 81, Paragraph 3⁷⁰ In order to determine whether the Treaty’s competition law provisions have been breached, the ECJ will need to establish whether the disputed rule contains a restriction on competition.

4.2.2.2 No restriction on competition: Convergence between freedom of workers/services and competition law provisions

The freedom of workers and freedom of movement provisions do ‘... not affect the composition of sport teams, in particular national teams, the formation of which is a question of purely sporting interest and as such has nothing to do with economic activity’⁷¹. It is well known that the Court in Walrave⁷², Donna⁷³, Bosman⁷⁴, Deliege⁷⁵ and Lehtonen⁷⁶ did not rule on whether the sporting rules in question were subject to the Treaty provisions on competition but dealt with the freedom of workers/services. In the Meca-Medina Case⁷⁷, however, the Court made explicitly clear that the principles extracted from the aforementioned case-law, thus as regards the application to sporting regulations of the Community provisions in respect of the freedom of movement of persons and services, are equally valid as regards the Treaty provisions relating to competition. So there exists strong convergence between the four freedom provisions and the competition rules⁷⁸. The fact that purely sporting legislation may have nothing to do with economic activity implies that this legislation has nothing to do with competition law issues. The rules of “purely sporting interest” escape the scope of Articles 81 EC and 82 EC. The underlying juridical basis for this exemption is one of the debated issues among scholars. If sport is an economic activity, sporting rules have at least some “economic purpose or effect” and thus it is questionable whether these rules should fall outside the scope of the competition laws⁷⁹. Rules of purely sporting interest, falling outside the scope of the four freedoms and competition laws, are so far:

- a. Nationality restrictions in national team sports⁸⁰,
- b. Rules relating to selection criteria⁸¹ and
- c. other ‘rules of the game’ such as rules fixing the length of matches or the number of players on the field⁸² do also fall outside the scope of the competition rules. The Court of First Instance extended this list of rules of purely sporting interest to:
- d. Doping rules.

69 Case C-415/93 URBSFA v Bosman [1995] ECR I-4921.

70 Compare Stephen Weatherill, *The Helsinki Report on Sport*, 25 E.L. Rev. June, 2000, p. 282-292 and European Commission, Jean-Francois Pons, *Sport and European Competition Policy*, Fordham Corporate Law Institute, Twenty-Sixth Annual Conference on International Antitrust Law and Policy, October 1999.

71 Walrave. Para.8.

72 Case 36/74 Walrave and Koch v UCI [1974] ECR 1405.

73 Case 13/76 Dona v Mantero [1976] ECR 1333.

74 Case C-415/93 URBSFA v Bosman [1995] ECR I-4921.

75 Cases C-51/96 & C-191/97 Deliege v Ligue de Judo [2000] ECR I-2549.

76 Case C-176/96 Lehtonen et al v FRSB [2000] ECR I-2681.

77 Case T-313/02 David Meca-Medina and Igor Majcen v Commission judgment of 30 September 2004.

78 On the topic of ‘convergence’ see K. Mortelmans, ‘Towards Convergence in the application of the rules on Free Movement and on Competition’ (2001) 38 CMLRev 613 (2001).

79 Compare f.e. Stephen Weatherill, “Fair play please!?: Recent developments in the application of EC Law to sport, *Common Market Law Review* 40: 2003 Kluwer Law International. Printed in the Netherlands, p. 51–93, 2003.c

80 Case 36/74 Walrave and Koch v UCI [1974] ECR 1405.

81 Cases C-51/96 & C-191/97 Deliege v Ligue de Judo [2000] ECR I-2549.

82 View of the CFI in Para.41. David Meca-Medina and Igor Majcen v Commission [2004] Case T-313/02.

In Meca-Medina, two professional swimmers, claimed that doping rules and certain control aspects, adopted by the International Olympic Committee (IOC) and implemented by the Fédération Internationale de Natation (FINA), were incompatible with the Community Competition Rules (Articles 81, 82 of the EC Treaty). In this case anti-doping rules were held to be purely sporting rules with no economic purpose and fall therefore, outside the scope of Articles 49 EC, 81 EC and 82 EC. As far as the Court was concerned, anti-doping regulations are justified on two grounds: “fair play” and the “safeguarding of the health of athletes”. Although it is debated whether these rules are “non-economic” the Court stated that these rules are non-economic in nature and so the Court didn’t have to apply other competition-law concepts⁸³.

The legal basis for this exception is not at all very clear. Because the Court mentioned two justifiable grounds, and because the ban of the athletes has great impact on their careers and thus have economic dimensions. It has therefore been debated that the Court had to apply the criteria laid down in the Case Wouters⁸⁴. In Wouters the Court analysed whether the restrictions are inherent in the pursuit of legitimate objectives. The Wouters criteria applied to sports mean that sporting rules may escape the prohibition if;

- the objectives pursuit thereof are legitimate and;
- the sporting rule is transparent and;
- proportionate and;
- there are no other less restrictive rules to fulfil the same objectives⁸⁵.

4.2.3 *Sporting rules in breach of competition laws, but legitimate*

4.2.3.1 *Legitimate objectives*

In Bosman the ECJ agreed on two legitimate objectives:

The aim of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results and:

Encouraging the recruitment and training of young players⁸⁶.

Besides the rules of “purely sporting interest”, the Court considered sport “special” at least as it comes to these objectives.

e. Transfer period

The conclusion of the Advocate General in the Lehtonen ruling, states that agreements about transfer regulations are, in principle, competition restricting but that this is not true for transfer regulations intended to guarantee the fair proceeding of a sports competition, such as the sports rule that restricts the transition of a player to another club for a limited period (sometimes referred to as ‘transfer period’)⁸⁷. In other words, the stipulation of a term of transfer, which prevents the player from leaving for another club during the playing season, can be directly linked to the integrity of sporting competitions. The need for a transfer period is characteristic of organized competitive sports and is ‘inherent’ to the sports organization and thereby, in principle, immune from competition law⁸⁸.

83 For the debate see S. Wheaterrill, Is the pyramid compatible with EC law, ISLJ, ????? See Case Wouters.

84 JanKoen Sluis, NTER.

85 Case C-309/99, *J.C.J. Wouters, J.W. Savelbergh, Price Waterhouse Belastingadviseurs BV v. Algemene Raad van de Nederlandse Orde van Advocaten*, judgment of 19 Feb. 2002, nyr, para 97.

86 Bosman. Para.106.

87 Case C-250/92, *Gottrup-Klim*, [1994] ECR I 5641. Case 51/96 and C-191/97, *Deliège*, [2000] ECR I 2549; Case C-176/96, *Lehtonen*, [2000] ECR I -2681.

88 Vogelaar, F.O.W. , *Marktwerking Moet!*, (speech Amsterdam UvA, Amsterdam: Vossiuspers AUP 2000. and Gronden, J.W. van de & Mortelmans, K.J.M., 'Het mededingingsrecht and niet-economische belangen: 2003 het cruciale jaar?', *Mededingingsmonografieën*, Deventer: Kluwer 2001, p. 319.

f. "at home and away from home" rule

In the Mouscron case the Commission rejected a complaint lodged by the Communauté Urbaine de Lille against UEFA⁸⁹. The Commission regarded the UEFA Cup rule to the effect that each club must play its home match at its own ground ("at home and away from home" rule) as a sports rule that does not fall within the scope of the Treaty's competition rules.

g. Playing home match in the opponent's country

In the Mouscron case, besides the home and away rule, the prevention of playing a home match in the opponents country was a point of concern. UEFA had introduced this further condition. According to the Commission's view there was not sufficient Community interest in examining more closely whether this further condition and its application could constitute examples of improper exercise of UEFA's regulatory powers that might significantly affect trade between Member States. Most strikingly the Commission mentions as one of the underlying reasons that: "this case must be assessed within the context of the national geographical organisation of football in Europe, which is not called into question by Community law".

h. Multiple ownership

The European Commission stated that the multiple ownership rule, or UEFA rule on 'integrity of the UEFA Club Competitions: Independence of clubs', falls outside the scope of the competition law provisions⁹⁰. The rule concerns, in short, the right of UEFA to intervene and take appropriate action in any situation in which it transpires that the same individual or legal entity is in a position to influence the management administration and/or sporting performance of more than one team participating in the same UEFA club competition⁹¹. After implementation UEFA applied for a negative clearance or exemption pursuant to article 81 (3). The Commission put forward that the rule is legitimate in case: "... such restrictions are limited to what is necessary to preserve the integrity of the UEFA club competitions and to ensure the uncertainty as to results. The rules have to be limited to their purpose and must remain in proportion to the objective. The Commission must confirm whether there are or not less restrictive means to achieve the same objective."

4.2.4 Restrictions in the labour market

i. Transfer regulations

For a long time European clubs within a certain branch of sports and organized in a coordinating league used to receive compensation when a player went to another club after his or her contract had expired. However, according to the European Commission there are major objections against such transfer compensations from the point of view of competition law⁹². As the Commission states, "Competition between the clubs is impeded since those regulations replace the normal regime of supply and demand with a uniform mechanism that leads to a preservation of the existing situation and deprives the clubs of the possibility to make use of the opportunity to employ players who under normal competition circumstances would offer their services in the Community and the European Economic Area"⁹³.

89

90 OJ C 363, 17-12-1999, p. 2, Communication made pursuant to article 19(3) of council regulation no 17 concerning request for negative clearance or for exemption pursuant to article 81 (3) of the EC treaty (Case No 37.632-UEFA Rule of 'Integrity of the UEFA club competitions: independence of clubs' 17 december 1999.

91 CAS 98/200 AEK Athens and Slavia Prague v UEFA 20 August 1999; COMP/37.806, ENIC/ UEFA, IP/02/942, 27 June 2002.

92 Koninklijke Belgische Voetbalbond [Royal Belgian Soccer Association] vs. J.-M. Bosman, Zaak C-415/93, 15 december 1995, jur. 1995, I-4921.

93 1998, IV/36,583, p. 23-24, nrs 53 t/m 55.

Transfer rules in breach of 81 (1)

We may assume that, by analogy with the Court's considerations regarding the free movement of persons, such regulations are not a suitable instrument for realizing legitimate objectives, such as guaranteeing a proper balance in financial means and sporting achievements, and supporting the search for new talent and the training of young players⁹⁴.

It is the case that time-consuming negotiations in Europe have led to a 'gentlemen's agreement' between the responsible EU Commissioners and the coordinating soccer league associations FIFA/UEFA in 2001. The international players' trade union FIFPro was not party to the agreement. The 'new' transfer regulations have meanwhile been incorporated into the rules. It is questionable whether these rules restrict competition, by virtue of their nature, purpose and effect or might escape from the legal stranglehold⁹⁵.

It is among the debated issues whether restrictions in the labour market should be dealt with by applying competition laws to sports or by applying labour law to sport⁹⁶. Since *Brentjens et al.* the Court made clear that competition law contains some immunity for labour related regulations as part of Collective Labour Agreements⁹⁷. The EC Court of Justice links this to the nature and the purpose of the Collective Labour Agreement, in which the social partners attempt to improve employment and labour conditions by their joint efforts. However, apart from practical bottlenecks and those associated with national law, it is not clear whether and to what extent transfer regulations can be accommodated in Collective Labour Agreements and to what extent those regulations may subsequently evade application of European competition law.

j. Television rights

Television without Frontiers directive

The "Television without Frontiers" directive establishes a legal framework for the free movement of television broadcasting services in order to promote the development of a European market in broadcasting and related activities, such as television advertising and the production of audiovisual programmes.⁹⁸ The directive states that The Member States may each draw up a list of events which must be broadcast unencrypted even if exclusive rights have been bought by pay-television stations. On the basis of the principle of mutual recognition, they must ensure that the various stations respect each of these lists. The events concerned may be national or other, such as the Olympic Games, the World Cup or the European Football Championship.

4.2.5 Restrictions in the exploitation market

Collective selling

Collective selling, by the clubs and the federation together, is presumed to restrict market forces, as no competition exists between the clubs mutually and fewer matches are broadcast than would be the case in free market conditions. In short: output is limited, prices are forced up (known as horizontal effects) and the market position of the main broadcasting undertaking(s) is reinforced (known as the vertical effect).

94 Belgische Voetbalbond t. J.-M. Bosman, Zaak C-415/93, 15 december 1995, jur. 1995, I-4921, r.o 14. Mortelmans.

95 M. Olfers, Nieuw Transfersysteem in de voetbalsport. Staat het kartelverbod van art. 81 EG Verdrag buiten spel?, Nederlands Juristenblad, jaargang 77, 1 10 February 2004. 2002, pp. 211-220.

96 M. Olfers, Over de social dialogue see R. Branco Martins, European Sport's first Collective Labour Agreement, 2002.

97 Joined Cases C 115/97, C 116/97 and C 117/97, *Brentjens*, [1999] ECR I-6025. Joined Cases C-180/98 C 184/98, *Pavlov* [2000] ECR I 6451. Case C 222/98 *From: der Woude*, [2000] ECR I 7111. Compare E.J.A. Franssen, A.T.J.M. Jacobs, A.Ph.C.M. Jaspers and K.J.M. Mortelmans, 'CAO's and mededingingsrecht', SMA 2000, p. 324-337.

⁹⁸ "[Television without Frontiers" directive \(89/552/EEC\)](#), adopted on 3 October 1989 by the Council and amended on 30 June 1997 by the European Parliament and the Council [Directive 97/36/EC](#).

Exclusive selling

In addition to collective selling, competition law problems are compounded by what is known as exclusivity. The supplier grants one single broadcaster the right to broadcast the game or games. In respect of exclusivity, the European Commission in its Competition Policy Newsletter of 1998 said: “Exclusivity is an accepted commercial practice in the broadcasting sector. It guarantees the value of a programme, and is particularly important in the case of sports, as a broadcast of a sports event is valuable for only a very short time. Exclusivity for limited periods should not in itself raise competition concerns. (...)”⁹⁹ Only exclusivity agreed to for a longer period of time is on a tenuous footing with the prohibition on cartels, as this practice can lead to “market foreclosure”¹⁰⁰.

In short: collective and exclusive selling (for a longer period) arrangements in competition law terms amount to price fixing mechanism, limit the availability of the rights of sport events and strengthen the position of the most important broadcasters limiting both competition between broadcasters and consumer choice¹⁰¹.

Who is entitled to broadcasting rights?

At European level, the Court of First Instance in October 2002 held that television rights are normally held by the organiser of a sporting event, who controls access to the premises where the event is staged¹⁰². This is without doubt true for individual sports. On the same ground the Court adds that: “Organisers of widely popular sporting events are often rather powerful national or international associations which are in an extremely strong situation with regard to television rights to certain events or certain types of sports, as there is usually a single national or international association for each sport.”¹⁰³

However, after the European Commission’s decision concerning UEFA, the Court’s approach needs some differentiation. Although the question of who is entitled to broadcast a certain event (or series of events) cannot be answered by the provisions of competition law, the European Commission still felt compelled, especially due to a lack of unequivocal national rules in the Member States and for the purpose of a sound competition law analysis, to give an opinion in this matter¹⁰⁴. The European Commission did, however, add that: “the Commission’s appreciation of the issue in this case is without prejudice to any determination by national courts.”¹⁰⁵

The European Commission takes the position that in the case of a match played by competing teams both participating clubs are able to claim certain rights¹⁰⁶. The individual club playing at home is, of course, entitled to an “at home right”, [comparable with – for example - the at home right under Dutch law] but according to the European Commission it “would be difficult to deny that the visiting club, as a necessary participant in the football match, should have some influence as to whether the match should be recorded and, if so, how and by whom.”¹⁰⁷ In other words, and further to the explanation above: because the match cannot be created without an opponent, the visiting club also has certain rights. In its decision the Commission, also recognises the co-ownership of the federation. In ground 122, the Commission determines that: “(...) UEFA can at best be considered as a co-owner of the rights but never the sole owner.” The latter was also made clear in the FIA case, because the Commission put

99 European Commission, Broadcasting of sports events and competition law. Competition policy newsletter 1998, no. 2, June, III.2.

100 Concerning exclusive rights cf. Hazel Fleming, Exclusive Rights to Broadcast Sporting Events in Europe, E.C.L.R. 1999, p. 143-148.

101 Speech/01/84, Mario Monti, European Commissioner for Competition, Competition and Sport the Rules of the game, Conference on "Governance in Sport", 26 February 2001, p. 6.

102 Judgment of the Court of 8 October 2002, in joint cases T-185/00, T-216/00, T-299/00 and T-300/00, Métropole télévision SA (M6) et alia v European Commission, ground 61.

103 OJ L 151 of 24 June 2000 p. Oo18-0041 ground 52. Decision of the Commission of 10 May 2000 Case no. IV/32.150-Eurovision.

104 European Commission: broadcasting of sports events and competition law. Competition policy newsletter 1998, no. 2, June, III.2.

105 Ground 122.

106 The European Commission has provided an opinion on the question of ownership as it is primarily up to the Commission to take a position on this and national law, given the European dimension, fails to provide a solution. Cf. OJ L 151 of 24 June 2000 p. Oo18-0041 ground 52. Decision of the Commission of 10 May 2000 Case no. IV/32.150-Eurovision. “TV rights normally belong to the organiser of the sports event, who decides whom to grant access to areas or spaces where the event takes place.”

107 Commission Decision, C (2003) 2627 final, Brussels, 23/7/2003, p. 33 ground 118.

forward that FIA may have been abusing its dominant position by claiming the sports rights of series it authorized.¹⁰⁸

And finally in ground 123 the Commission concludes that: “The Commission therefore proceeds on the basis that there is co-ownership between the football clubs and UEFA for the individual matches, but that the co-ownership does not concern horizontally all the rights arising from a football tournament.”¹⁰⁹

Relevant market

The European Commission will not consider that the broadcasting rights for football matches can be substituted by other sports broadcasting rights¹¹⁰. The European Commission takes the position that there is a separate market for football matches in the framework of an (annual) competition. It assumes that if the price of the rights were to increase by a certain percentage (5-10%), an interested broadcaster would not (readily) settle for the purchase of other entertainment or the rights of other sports matches.

Joint selling arrangement permitted pursuant 81 (3)

- Single selling point

A collective selling arrangement gives the media undertakings an opportunity to offer the entire competition during a whole season. With a single selling point, it is easy for broadcasters to determine a schedule and approach advertisers. It moreover offers advertisers the possibility to conduct a specific campaign over a longer period of time and offers broadcasters the chance of binding advertisers to them for a longer period of time. The broadcaster’s financial risk is minimised, because, other than in the case of individual selling, he does not run the risk of betting on the “wrong” club, i.e. a club which ends up in the lower regions of the competition and loses the public’s attention. Minor clubs benefit from a central selling point, as, generally speaking, they are less well able through lack of experience and commercial opportunities, to sell the rights themselves. Finally, the consumer also benefits, as the consumer wants to be able to watch the match live, preferably without first having to find out by whom, where and when the match is offered.

- The brand is protected, efficiency?

The brand name is protected by collective selling, as, among other things, the product is presented uniformly. This is also to the advantage of the broadcasters as they can broadcast a recognisable product and it benefits the consumer who is indeed able quickly to recognise the product. In addition, it benefits objectivity, because in individual selling the club will sooner promote itself than place itself in the service of another club or the federation. It has to be noted, though, in reference to the principle of locality and nationality, that the identity of the club is different from the identity of the national competition. The national championship is only a means by which the individual club can establish its own identity. By analogy, it can be assumed that - for example -the brand “Eredivisie NV Nederland” (Dutch Premier League Ltd) is also protected by collective selling.

- Financial solidarity between clubs

At the European level, a certain balance is recognised between the clubs, justifying a flow of funds from the major to the minor clubs. However, the European Commission considers this argument less important than the previous arguments.

-Collectivity only fails when there is no market demand for the joint product

If the federation is unsuccessful in exploiting (part of) the rights, the clubs have to exploit these rights individually. This will ensure a better response to market demand. There is nothing to prevent giving clubs the right to exploit the rights individually either, if this is done some time after the live broadcast.

In short: A collective sales arrangement offers sufficient efficiencies for all market players. It gives all parties certainty for a given period. For the clubs (specifically the smaller clubs with smaller fan bases) it means a shift from the small home market to a larger (national) sales market. A central point of sale means there is expertise available. The consumer knows where, when and by whom matches will be broadcast. The brand name of the competition is protected. Furthermore, there is greater objectivity since, in the case of individual sales, the club

108 FIA

109 Commission Decision, C (2003) 2627 final, Brussels, 23/7/2003, p. 35.

110 C (2003) 2627 final Commission Decision of 23 July 2003, Brussels, point 62. Cf. Commission Decision COMP/M.2483-Canal+/RTL/GJCD?JV, (IP 01/1579).

would rather promote itself than serve the interests of another club or the league association. The national championship is the single means by which individual clubs can derive their identity¹¹¹.

It can be concluded from the Commission's decisions that collective sales are permitted pursuant to Section 81, Paragraph 3 of the EC Treaty, provided that the media rights are divided into a number of packages before being put on the market by the collective in the form of a non-discriminatory tender procedure. If the league association fails to exploit (part of) the rights, the clubs should exploit those rights on an individual basis¹¹². There is also nothing to prevent the clubs from exploiting the rights individually, at some point after the live broadcast.

Striking changes:

The package approach: rights are divided over a number of packages.

The right to exclusive selling expires the minute the league is unable to sell the rights.

After the live broadcast the clubs become entitled to sell the match in question.

Selling of the rights by means of a tendering procedure.

k. Ticketing

In the case distribution of package tours during the 1990 world cup, the commission considered that FIFA, the local Committee Italia'90 and others have infringed article 81 (1)¹¹³. It was claimed that only one tour operator could be authorized to put together package tours comprising entrance tickets for sale at world level. The parties claimed that any restriction was justified by safety grounds. The Commission, however, considered that a number of tour operators imposing the same ticket conditions on travel agencies authorized to sell their package tours could have competed on the market without jeopardizing safety.

In 1998 the World Cup Finals were held in France. FIFA established regulations providing that the organisation committee of the World Championship 1998 ("CFO") was responsible for all matters relating to price, distribution, and sale of entry tickets for finals matches. The principal concern for the CFO was that rival groups of supporters of participating teams were separated from one another. THE CFO considered it necessary to treat all members of the general public other than those able to provide an address in France as a potential rival supporter in 1996 and 1997 for purpose of ticket sales. According the Commission this policy was excessive. Since ticket sales were artificially and predominantly limited by the CFO, CFO had abused its dominance¹¹⁴.

For the Olympic Games in Athens the Commission cleared the ticket arrangements¹¹⁵.

4.2.6 *The formation of a new league (break-away leagues)*

The Commission does not call the monopolistic role of the federations into question, as their international structure is recognised to be the most efficient way of organising sport¹¹⁶. In the Mouscron case the Commission pointed out that also the national geographical organisation of football in Europe is not called into question by community law. It is not clear in what way and to what extend the national associations have to be protected from the scope of the competition laws.

Sports associations tend to forbid (directly or indirectly) the members (clubs or persons) to play in competing sport leagues. This type of regulations stipulates for example that the members of the association may only participate in organized or authorized events of the federation. But also in other ways the controlling association can use its power to prevent the creation of a new league, f.e. by contracts which prevent facilities to be used in other competitions, or by penalties when clubs play in competing leagues (the withdrawal of a licence), etc. The Commission has put forward to the Fédération Internationale d'Automobile (FIA), that the FIA had to stick to its

111 A certain balance between the clubs is recognized on a European level, for this a flow of money from the large clubs should go to the smaller clubs. However, the Commission deems this argument to be of less importance than the previous arguments.

112 Commission Decision, C (2003) 2627 final, Brussels, 23/7/2003

113 OJ 326, 12-11-1992, p. 31-42.

114 Commission decision relating a proceeding under article 82 of the EC Treaty and article 54 of the EEA Agreement (Case IV/368888-1998 Football World Cup).

115 IP/03/738.

116 Commission, consultation document of DG X, The European Model of sport, 1998.

regulatory role, so as to prevent any “conflict of interests”. In this case the Commission objected to certain of the FIA rules in 1999 on the grounds that FIA had abused its power (article 82 EC) by putting unnecessary restrictions on promoters, circuit owners, vehicle manufacturers and drivers as well as to certain provisions in the commercial agreements with television broadcasters. The Commission made clear that the FIA rules might not be used to prevent or impede new competitions unless justified on grounds related to the safe, fair or orderly conduct of motor sport¹¹⁷. This reasoning can be extended to all other sports.

The attempt to establish a European Super League in football led to a complaint against UEFA, because it was argued that UEFA had abused its monopoly power by the prevention of the creation of a super league. Unfortunately, neither the Commission nor the Court has come to legal findings on this issue. UEFA made clear in a press release with the title: European Club football –National Associations, their leagues and club want UEFA to remain in charge, that UEFA is opposed to “any concept susceptible of having a negative influence on the existing domestic and European competitions and of endangering the future of national teams.”¹¹⁸ In a later statement the UEFA rejects the proposed introduction of the EuroLeague concept¹¹⁹. In this statement the UEFA set out 10 principles for European club football and starts with the principle that:

“Domestic club football is the lifeblood of the professional game and must be protected.”¹²⁰

Hellenthal has researched the permissibility of a supranational European Football League under the provisions of European Competition Law into depth¹²¹. UEFA Statutes oblige the national Member Associations and the clubs of the national licensed leagues to refrain from any independent activity in the sphere of the organisation of European competitions for club teams unless UEFA gives its approval. In Hellenthal’s opinion this constitutes a measure designed to, and having the effect of restricting competition on the market for the organisation of European club competitions within the area covered by UEFA’s Member Associations, and which is apt to affect trade between the Member States. There is no barrier to such a violation inherent in the facts, nor any exemption pursuant to 81 (3) EC. These rules are therefore null and void pursuant to Art. 81 (2). Because of UEFA’s dominant position, the rules can be considered abusive and constitute a violation of article 81 EC.

He argues further that a closed competition system constitutes an agreement between enterprises with the aim and effect of clearly preventing third parties from competing on the market for the rights to participate in a European Football League, and constitutes also a violation of the competition laws. The promotion and relegation model for a European League also constitutes a fundamental breach of the European ban on cartels, Art. 81 Para. 1, Clause 1 of the EC Treaty. However Hellenthal argues that the objective necessity of the relegation system for the continued existence and proper functioning of a competition pyramid comprised of different leagues does justify the qualification of the offence elements, if the promotion and relegation rules are appropriate.

The Summary and Outlook by Hellenthal read in full as follows:

“I. Summary of the key findings

The findings of the study can be summed up as follows:

The requirement for assent, as embodied in Art. 45 Para. 3 of the UEFA Statutes, in conjunction with the allocation of competence in Paragraph 1, obliges the national Member Associations and the clubs of the national licensed leagues to refrain from any independent activity in the sphere of the organisation of European competitions for club

117 IP/01/1523, Brussels, 30 October 2001.

118 Press Release, UEFA; European Club football –National Associations, their leagues and clubs ant UEFA to remain in charge, 30 July 1998.

119 UEFA Statement on club football, 15/12/2000.

120 UEFA Statement on club football, 15/12/2000.

121 Christian Hellenthal, Zulässigkeit einer supranationalen Fussball_Europaliga nach den Bestimmungen des europäischen Wettbewerbsrechts, Frankfurt am Main, 2000.

teams unless UEFA gives its approval. The scope of application of the provision does not extend to media enterprises outside the association structures.

Art. 45 Para. 3 in conjunction with Para. 1 of the UEFA Statutes constitutes a measure designed to, and having the effect of restricting competition on the market for the organisation of European club competitions within the area covered by UEFA's Member Associations, and which is apt to affect trade between the Member States, Art. 81(1), Clause 1 of the EC Treaty. There is no barrier to such a violation or inherent in the facts, nor can it be exempt pursuant to Art. 81 Para. 3 of the EC Treaty. Art. 45 Para. 3 in conjunction with Para. 1 of the UEFA Statutes is null and void pursuant to Art. 81 Para. 2 of the EC Treaty and is therefore without legal effect.

UEFA also uses its dominant position on the market to organise European club competitions within the area covered by the UEFA Member Associations. This area can be equated with a significant share of the common market, can be considered abusive on the grounds of the requirement for assent laid down in Art. 45 Para. 3 of the EC Treaty and also affects trade between the Member States. Inasmuch this constitutes a violation of the prohibition of abuse laid down in Art. 82 of the EC Treaty, on which grounds it is also null and void in the eyes of the law.

An agreement between top European clubs regarding the formation of a European Football League with a closed circle of participants constitutes an agreement between enterprises with the aim and effect of clearly preventing third parties from competing on the market for the rights to participate in a European Football League, and which is apt to affect trade between the Member States, Art. 81 Para. 1, Clause 1 of the EC Treaty. Thus there can be no qualification of the offence elements in the form of a barrier inherent in those facts, nor any exemption pursuant to Art. 81 Para. 3 of the EC Treaty.

The "open circle" model for a European League also constitutes a fundamental breach of the European ban on cartels, Art. 81 Para. 1, Clause 1 of the EC Treaty. However, the objective necessity of the relegation system for the continued existence and proper functioning of a competition pyramid comprised of different leagues does justify the qualification of the offence elements, if the promotion and relegation rules are appropriate.

As there is no abuse taking place, the formation of a European football league by top European clubs certainly is not tantamount to the abuse of a dominant position on the market pursuant to Art. 82 of the EC Treaty.

The Statutes and Regulations of the German Football Association do not constitute a legal basis for sanctioning the formation of a European football league or participation in such a league, and nor do the UEFA Statutes. Therefore, the clubs cannot legitimately be excluded from the German licensed leagues or the European competitions organised by the associations. If, however, the associations were to exclude them, the clubs could take the matter to arbitration once they have exhausted their respective internal channels.

II. Outlook

Although it remains unclear when and in what form we can expect a European Football League to be formed, the findings of this study do permit some conclusions to be drawn about the future development of European club football.

Quite apart from the difficulties that such a league is likely to encounter in gaining acceptance in different cultures, and UEFA's opposition, the closed circle model for a European League will not work in practice, for the sole reason that it is contrary to the provisions of European competition law.

However, this does not preclude the formation of a European Football League inasmuch as the open circle based on the European relegation system would meet the needs of the interest groups involved in the whole project.

This approach does not so much create legal problems as practical issues with regard to its implementation. If promotion and relegation rules are to be set, the European Football League must be incorporated in a hierarchical league system. At the present time, this infrastructure exists only in the shape of the national and international football associations. With the individual leading associations occupying a de facto monopoly position, even the financially well-endowed organisers of a European Football League are likely to find it virtually impossible to create a similar, functioning basis.

This being the case, the solution might be to cooperate with the national umbrella associations or UEFA – except that they are highly critical of the project, seeing no need to change the decades-old, tried-and-tested structures. Although the UEFA Champions League competition has undergone a long line of reforms in recent years and, latterly, has even begun exhibiting the traits of a “true” European league, there is reluctance among the associations to completely abandon the dual system of national licensed leagues and European competitions. This is because every decision they take is motivated by the desire to represent the interests of the sport of football and not to succumb to financial temptation. In many cases, however, the clubs’ sole concern is to ensure the greatest possible certainty in their financial planning, so their motives are economic.

Thus the formation of a European Football League hinges above all on whether common ground can be found between these conflicting interests. This process will take time – just how long is impossible to predict at this juncture, because of the many imponderables involved. Taking the long-term view, however, the associations will not be able to hold out against the demands of Europe’s top clubs and the television companies and commercial agents. The constant reforms of the UEFA Champions League are evidence that this development is being driven by the laws of the market and so will not bow before the might of the associations.

Politics will dictate that there will be a number of interim models before the league finally takes shape, all of which will conform to the open circle model discussed in this study. In light of the practical issues highlighted in this study, Europe’s top clubs will most definitely not “go it alone”.

4.2.7 *Licensing*

I. Clubs

In all other industries the market defines the number of firms in the industry in compliance with the aims of antitrust or competition law which promote free entry and expansion. A bakery-store has to accept another bakery store in the same village even if this means vigorous competition and even if severe competition might lead to the bankruptcy. Licensing is in competition law terms a barrier to entry the market, because of its compulsory character. A licensing-system can only be accepted to the extent that the regulations fulfil the criteria laid down in 81 (3). Entry-barriers, however, are typical for the sports industry. The right to take part is depended on membership and membership is in most cases depended on the possession of a license. It is self evident that these kind of rules derive from a need inherent in the organization of competitions. Competitions cannot be free to all. The justification for these “entry barriers” in the sport industry lies in the unique pyramid sports structure and the required competitive balance among competitors.

Because of the (quasi) monopolist power of the league a failure to obtain a licence implicates failure to participate in competitions. A football association may never prevent or impede (new) clubs from taking part in competitions, unless justified on grounds related to the safe, fair or orderly conduct of football.

The challenge of these licenses can, in our opinion, only be accepted in case the following criteria are met;
non-discriminatory; this means the rules must be equally valid; national association must deal with these issues in a similar matter;
objectivity;
proportionality; The rules must go no further than is reasonably necessary to protect the legitimate interest of the association ;

subsidiarity; there are no less restrictive means to pursue the legitimate objectives and, transparency.

In a study undertaken by the Free University of Amsterdam of 1994 the following is considered regarding the acceptability of a European (UEFA) licensing system:

“A UEFA licensing system and articles 85 and 86

A UEFA licensing system will have to take account of competition rules of the European Union. It was shown before that both articles of the EC treaty apply to UEFA because it is an undertaking or an employers' association. The licensing system that it is considering would be regarded as a decision within the meaning of article 85.

UEFA can also be regarded as an undertaking with a position of power within the meaning of article 86. It is, after all, the only European football association, and if European clubs want to participate in European competitions they have to abide by UEFA's rules, since there are no other opportunities to participate in such competitions.

Article 85 should be seen in conjunction with article 86. The final two paragraphs of article 85 are relevant here. Does the licensing scheme have the object or effect of preventing, restricting or distorting competition within the internal market, and does the scheme have an unfavourable affect on trade between member states?

With regard to the issue of distortion of competition, article 86 becomes relevant. This because abuse of a position of power leads to distortion of competition, in which case a breach of article 86 is also a breach of article 85.

Holding a position of power as such is not prohibited under article 86. But an undertaking with a position of power has a special responsibility not to obstruct competition on the internal market through its activities¹²²

Thus, the creation of a monopoly is not allowed to hinder the free movement of labour and services. This guarantee of free movement is laid down in articles 48 and 59 of the EC treaty. In the current situation UEFA has already had to take account of these articles when setting limits to the number foreign footballers allowed to play for clubs participating in European competitions.

It is important to note here that not all sporting rules which seem to obstruct the free movement of labour and services constitute breaches of articles 48 and/or 59. An exception applies if the sporting rule is important for the sport and as such falls outside the economic activity¹²³ Thus, not all the rules included by UEFA in the licensing scheme can be tested against EC law. For instance, if a UEFA licensing system were to include a provision concerning a minimum number of contracted players (as included in the Dutch system under article 9 of the Licence Conditions), this almost certainly does not constitute a breach of articles 48 and/or 59. This requirement can be regarded as being in the interest of the sport, and as such it falls outside the economic activity. And in any case this rule does not restrict the free movement of labour, it actually encourages it.

Therefore, UEFA would have to be careful about introducing rules that do not fall outside the economic activity but which do restrict the free movement of labour and services. It is beyond the scope of this research task to indicate precisely which rules are still compatible with EC law and which are no longer so. But we can imagine that if UEFA were to set strict standards on the clubs' finances, this could indirectly affect and restrict the free movement of labour and services. For instance, rules stipulating that clubs can only buy a certain number of foreign players will quickly come into conflict with the principle of the free movement of labour.

In conclusion, then, it can be said that if UEFA introduces a licensing system, it runs the risk that this system will conflict with certain aspects of EC law if it imposes excessive requirements on the European clubs. From this legal perspective, this is more an argument against the introduction of a UEFA licensing system than an argument for it.”

m. licensing and player's agents

A player agent introduces for a fee and on regular basis players to a club with a view to the conclusion of a contract of employment, or to introduce two clubs to one another with a view to the conclusion of a transfer contract. Mr Piau lodged a complaint with the European Commission, because he claimed that the

122 Michelin/Commission, case 322/81, Court of Justice of the EC, Judgement of 9 November 1983, Jur. 1983, p. 3461, ground 57.

123 Koch/Walrave, Court of Justice of the EC, 12 December 1974, NJ 1975, 148.

licensing system was too restrictive. To carry on the occupation of a player agent, a person must hold a licence issued by the competent association. Licensing is in competition law terms a barrier to entry the market for supply of professional services, because of its compulsory character. A licensing-system can only be accepted to the extent that the regulations fulfil the criteria laid down in 81 (3). After some improvements and deletions, the Commission decided to take no further action.

The regulations proscribe that the occupation of players' agent can be carried on if the applicant passes an examination in the form of a multiple choice test; if the relations between the agent and the player are subject of a written contract for a maximum period of two years, which may be renewed, if the contract specifies the agent's remuneration, to be calculated on the basis of the player's basic gross salary, if the person has a professional insurance etc.

Mr Piau questioned the lawfulness of decision taken by the Commission and went to Court. The Court reasoned that the Commission was able to consider that the examination provided sufficient guarantees of objectivity and transparency and that the obligation to take out professional insurance did not constitute a disproportionate requirement, and that the provisions in the regulations relating to the remuneration of players' agents did not constitute the fixing of imposed prices within the meaning of competition law.

Since the FIFA regulations do not impose quantitative restrictions on access to the occupation of players' agent which harm competition, but only qualitative restrictions which, in this case were justified, the FIFA did not abuse its dominance.

n. Relocation

The English football club Wimbledon FC wanted to move from South London to Milton Keynes, located in Ireland. Not one of the clubs objected to the relocation. The relevant football leagues, however, locked this proposed move. UEFA stated that it “does not support such a move, because of the damaging effect it would have on domestic football in European Countries. ... football played within a national territory is the responsibility of the UEFA member association of the territory concerned. For this reason, UEFA is against any move to play domestic football outside a national territory.”¹²⁴ After a complaint lodged by Wimbledon football club, an independent commission set up by the football association allowed the club to move. This independent Commission found the presumed allegation that such a move would contradict the core principles of the pyramid structure not a sufficient reason to refuse the application. The Football Association accepted the decision but made clear that this was an exceptional case and that a move of a club is “not in the best interest of the game”. It is arguable that the prevention of relocation contravenes competition law principles.

4.2.8 *Player release*

The G14 group, has recently joined a lawsuit by the Belgium club, Charleroi, against Fifa. Football club Charleroi filed this lawsuit because the football player Abdelmajid Oulmers was injured when playing for the Moroccan national team. The G-14 asks the Judge to declare the illegality of the FIFA regulation and states that FIFA abuses its dominant position (art. 82 EC). The question is, whether the current rules are necessary to sports and to the sports organisation.

4.2.9 *State aid*

It has long been the case that local authorities in particular support sports clubs financially. This subsidization can take all kinds of forms, from tax measures to subsidies and gifts. Local authorities are especially keen to show their

124 Adrian Barr-Smith, Elliott Payne and Lee Sennett, “Franchise United: The beginning of Franchise Football, The relocation by Wimbledon F.C.”International Sports Law journal, 2003/1.

involvement with their local teams by acting as ‘sponsor’. Apart from this, it is not uncommon for national governments to see to it that clubs do not go bankrupt, for instance by applying ‘soft’ tax measures¹²⁵.

These political choices at local level, however, may be in contravention of the Community rules, including the sections on state support (article 87 of the EC Treaty). According to the European Commission, state support gives rise to major objections from the point of view of competition law. This is evidenced by the letter sent by Director General of Competition A. Schaub of the European Commission to the Dutch representatives in Brussels, from which it can be concluded (indirectly) that a number of municipalities in the Netherlands have violated state support rules¹²⁶. Another indication is the investigation into the conduct of the Italian government¹²⁷.

To justify a violation of the state support rules, people cite the recreational, sporting, cultural, social and economic significance of the club for the town. But unlike the United States where democratic legitimacy is central, in Europe the legitimacy of government support of soccer clubs is placed in a Community framework of competition law. In a letter, the European Commission states that support within the framework of the national school system, because of its educational nature¹²⁸ as well as the infrastructure f.e. stadiums may (possibly) fall outside the scope of application of Section 87 of the EC Treaty. It is interesting to note that the emphasis in the entire discussion about state support to soccer clubs is on local social arguments, while no realistic considerations with respect to competition law are put forward.

4.3 Social Dialogue

4.3.1 Introduction

The social dialogue has been embedded in the European legislation with the 1999 treaty of Amsterdam. Since then both sides of the industry, employers and workers, have been involved intensively in the policy development and legislation process. This contribution explains the meaning of the term Social Dialogue. It also indicates just how the social dialogue works, and the practical consequences of the social dialogue for the European member states.

After that we will describe some aspects that are currently at stake in the EU professional football sector and that could be regulated properly after a well organized Social Dialogue in the EU professional football sector.

4.3.2 What does Social Dialogue mean?

Social Dialogue is a system of consultation for employers and employees (the social partners) at a central European level and at the level of the European sectors. The social dialogue has been included in the EC treaty in articles 138 and 139 EC.

The Social Dialogue has various tasks. In the first place, both sides of the industry can consult with each other on social subjects they deem to be important to European integration. They can draw up recommendations on this, though these are not legally binding. But they may also enter into agreements which they then propose to the Council, with the request that they be made binding. The following paragraph goes into greater detail on these agreements.

Secondly, the Social Dialogue has a co-legislative task. The Commission is obliged to consult the Social Dialogue on all plans for social regulations that the Council may decide upon with a qualifying majority. Both sides of the

125 IP/03/1529, Brussel, 11 november 2003, Commissie onderzoekt maatregelen voor professionele sportclubs in Italië (“Salva calcio”).

126 Europese Commissie, DG Concurrentie, Alexander Schaub, juli 2002. Alle kranten maakten reporting van de brief midden november waaronder bijvoorbeeld NRC Handelsblad, 18 november 2002, voorpagina “EU valt over steun to voetbalclubs.

127 IP/03/1529, Brussels, 11 November 2003, Commissie onderzoekt maatregelen voor professionele sportclubs in Italië (“Salva calcio”).

128 Commission decision, 25 April 2001, SG (2001) D/288165.

industry may then decide to negotiate the relevant issue, and to attempt to reach agreement. They have nine months in which to do so. If an agreement is reached, both sides of the industry may present it to the Council with the request to make it binding for the member states.

The social partners are not dependent on action from the Commission. They may use their own initiative to produce proposals.

4.3.3 Content of the agreements between both sides of the industry at European level

In principle the agreements between the social partners may deal with any topic. So it is not the case that the agreements between the social partners should only deal with social subjects. The Brentjens ruling by the European Court is interesting in this regard. According to this ruling, provisions are even permissible which limit the economic competition between member states in some way, if they have been made on the basis of collective negotiations. Although a certain amount of competition restriction is normal for collective agreements between employers' organizations and unions, the possibility of reaching the social politics objectives which such agreements strive towards, is seriously hindered when EC treaty article 81 is taken into account. The nature and objective of such negotiations oppose this.

After entering into such agreements, the problem then occurs of trying to implement them. How does this take place at a national level?

4.3.4 Effect of agreements of European social partners in a member state

As stated above, the dialogue between social partners may lead to contractual relations, including agreements. The member states are then still not obliged to apply the agreements directly. Neither are they obliged to convert the agreements into national legislation. Initially only the parties to the agreement are bound to it.

The implementation of agreements concluded at community level between social partners can occur in a member state in two ways. Firstly, through procedures which are typical for the social partners in a member state. Secondly, an agreement can automatically obtain legal effect at a national level through a decision of the Council on the proposal of the Committee. These methods of implementing agreements between social partners on the European level are considered more closely hereunder.

4.3.5 Implementation of European agreements by social partners at the national level

The agreements can be executed by the relevant national organizations. The coordinating social partners oblige each other to convert the European agreements into national agreements. The most obvious form of conversion is the translation of the stipulations into a national collective labour agreement.

Noteworthy in this option is the observance of the agreements. At issue here is a private law agreement. Not observing the agreement will only lead to breach of contract and therefore to liability on the basis of civil law.

4.3.6 Implementation of European agreements through a decision of the Council

After the social partners have reached an agreement, they may request the Committee to submit the agreement to the Council. The Council may then declare the agreement between the social partners to be mandatory for all

member states. The binding declaration means the Council lays down an obligation by means of a guideline, so that all member states must implement the agreement.

A condition for declaring an agreement between the social partners to be binding is that the parties submit their request jointly to the Council, and that the subjects submitted to be made binding stem from Treaty article 137 EC. Payment is currently not addressed.

In addition the social partners must be prepared for the fact that their agreements must be in accordance with the EC Treaty. If this is not the case, a community decision is out of the question. This is called the criterion of legality. Apart from that the decision taken should fall within the area of competence of the Committee and the Council. After all, these bodies cannot regulate matters outside their competence. Another criterion is the representativeness of the social partner. This will be dealt with at a later stage.

The Council cannot amend the agreement submitted to it to be declared binding. Should this be the case then the normal legislation procedure would apply. It is unlikely that the Council would refuse to declare the proposal binding. After all, an agreement concluded between social partners has a broad basis.

Council decisions are promulgated in the form of directives. Member states are obliged to convert the content of such a directive into national law within a certain period. The social partners will formulate their agreement as a directive to facilitate it being declared binding by the Council.

It should now be clarified just when an organization may adopt the name 'social partner' at the European level. The main factor is the requirement that it be representative.

4.3.7 Criteria for social partners

It may generally be noted that the level of representation must be in accordance with the nature and scope of the subject. In a notice the Committee has set out in detail just what is expected from a social partner. In this 1993 Notice the Committee described three criteria to be met in order to be sufficiently representative:

The organizations must be representative at branch-coordinating, branch and professional levels and must be organized at a European level;

They must consist of organizations which themselves form an integral and recognized part of the member states' social partner structures, they must be empowered to negotiate agreements, and as far as possible they should be representative for all member states;

They must have adequate structures enabling them to take part effectively in the consultation process.

So far the closest involvement in consultation and advice has been observed in the branch-coordinating employers' organizations UNICE and CEEP. For the employees, representation consists of the ETUC. These three organizations have been involved in the process which ultimately led to the current social dialogue articles in the EC Treaty.

Apart from that, sector organizations have been active for some time at a communal level. The Committee has taken the initiative to strengthen the sectoral dialogue on the basis of its notice governing the development of the social dialogue at a communal level.

As this was being written the Committee had some 25 committees supporting the social dialogue in different sectors. These sectors include civil aviation, sea transport, railways, telecommunications, trade and electricity.

4.3.8 *Social Dialogue in Football*

A social dialogue as described in the EU Treaty would bring together both sides of the industry. If both sides of the industry will be brought together in football, players and clubs, then one could say that a social dialogue would in fact lead to a collective bargaining agreement in the EU professional football sector.

Below are noted the issues which are of exceptional importance within current European professional football; these issues can and will certainly be discussed in a social dialogue.

However, before pursuing this, the nature of the collective labour agreement in European football must be discussed, as there are in fact two ways of executing the collective labour agreement.

The collective labour agreement will contain provisions falling under article 137. In that case the social partners can request the Commission to submit the proposal to the Council. The Council is subsequently authorized to declare by means of a directive that the provisions from the agreement between the social partners based on article 137 are mandatory for each member state. In addition, the social partners from the European professional football sector will want to collectively arrange matters which fall outside the criteria of article 137 EC.

A closer look should be taken at just what matters are included in article 137. After that it can be indicated which subjects from a collective labour agreement can be declared mandatory by means of a directive, and what the consequences would be.

Other matters which are part of the social dialogue and which may perhaps be part of a collective agreement will thereafter be considered.

The enforceability of a collective labour agreement will also be discussed. Specifically there will be a consideration of the part which may be declared mandatory by a directive, and the part of a collective labour agreement which is outside the scope of article 137.

4.3.9 *EC Treaty Article 137*

The Council can declare agreements between social partners included in EC Treaty article 137 to be binding by a joint request from the social partners. The implementation of the stipulations is submitted to the member states as being obligatory, by means of a directive.

Article 137 can be divided into two paragraphs in respect of its subjects. These are Article 137 paragraph 1 and paragraph 3.

EC Treaty Article 137 paragraph 1

The items in article 137 paragraph 1 are:

- Improving the working environment to protect employee health and safety;
- The working conditions;
- The information and consultation of the employees;
- The integration of those excluded from the labour market;
- The equality of men and women with regard to labour market opportunities and treatment at work.

Agreements concluded on these subjects between social partners can be declared mandatory by the Council with a qualified majority of votes. The agreements based on the conditions from this article easily meet these criteria when

they stem from the social dialogue between social partners. In particular items 2 and 3 can also be included in a collective labour agreement. This will be dealt with later.

EC Treaty Article 137 paragraph 3

If a collective agreement can be reconciled with EC Treaty article 137 paragraph 3 and the social partners request the Council to declare this as mandatory, the Council must decide on this unanimously. The following matters are covered:

Social security and protection of the employees;
Protection of employees on terminating the employment contract;
The representation and collective defence of the collective interests of the employees and employers, including employee participation;
The employment conditions for subjects of third countries who live legally in a community territory;
The financial contributions for enhancing employment and creating jobs.

Here also the first three items determine the emphasis of the collective consultation between employers and trade unions. This will be discussed shortly.

Now it is clear just which matters may be declared mandatory for each member state by means of a directive. Broadly speaking these matters may generally be declared mandatory for the same reasons that matters are generally declared mandatory within the Netherlands, thus also binding non-organized employers and employees to the agreements.

The main factors in a request for a general declaration of obligation in the Netherlands, are that by this means certain facilities can be financed by the entire sector and not only by the organized employers and employees. Branch-organized funds such as training funds and pension funds are examples of this. In this way a broader financial base is created.

Following this theoretical section, the following paragraphs can concentrate on the actual practice.

4.3.10 Subjects for collective consultation and the content of agreement in European professional football

European football is the largest entertainment industry in the world. The European professional football sector comprises various markets. A major difference with other sectors is the fact that the clubs are interdependent in competition. A certain form of competition regulation is therefore required to keep the sector economically healthy.

Apart from that it has been shown that many European professional football problems involve labour law. The consequences of directive 1999/70 EC affect national jurisdictions, the termination of agreements is regulated by national law, players from outside the EU are or are not allowed to enter the labour market according to national labour law procedures, the transfer amounts are compensations for the employment contract, etc.

It is clear that the current FIFA regulations are in conflict with the national labour law when they try to regulate the abovementioned matters. If one wants to prevent the regulations applicable to football from being in conflict with the labour law, these items are to be discussed in a social dialogue and should be included in a collective agreement to be concluded between employers and employees. The fact is that these parties are primarily responsible for, and the main addressees of, a regulation – both economically and socially.

It will now be determined which matters can actually apply to football. First there is a point by point indication of the agreements which can be based on article 137 and thus can be part of a directive. Matters then follow which are outside the scope of article 137, but pursuant to article 139 paragraph 1 may lead to agreements between social partners at the European level.

It must be emphasized however that it is impossible to exhaustively discuss each matter to be dealt with at the European level. It is also not the intention that everything discussed below must be incorporated in a collective labour agreement. The emphasis lies in the fact that by means of the social dialogue it is possible to negotiate this at the European level within the framework offered by the EC Treaty. Furthermore, it will then be possible to make binding arrangements on these matters.

Article 137 paragraph 1

By a qualified majority of votes the Council can declare as mandatory, agreements which can be reconciled with article 137 paragraph 1. These items will be mentioned, along with an example of what can be of interest for European football.

Information and consultation of the employees

The social partners can have an agreement declared mandatory. The parties which are social partners at the national level can ensure a proper implementation. Through information and by organizing courses and information seminars, both employees and employers can be kept well-informed on the relevant regulations, and on preventing and knowing how to deal with complications.

Integration of those excluded from the labour market

Under certain conditions the trade unions can be obliged to take care of players who do not have a club, and to ensure (re)integration into the labour market. The football branch is well aware of the special circumstances involved, as those who do not play do not chalk up any so-called game rhythm, and those who do not have game rhythm will not easily be eligible for an employment contract.

4.3.11 Article 137 paragraph 3

By unanimous vote the Council can declare as mandatory agreements which can be reconciled with article 137 paragraph 1. These items are mentioned, and an example of something which may be of interest for European football.

Social security and the protection of employees

A so-called bridging pension can be quoted in this context. During his active career the player deposits a percentage of his salary into a fund. At the end of his career he bridges the years up to his pension financially by means of payments from the fund. These payments will then fall under a favourable tax rate.

Protection of the employee on termination of the employment contract

There is no need to explain the need for an article on this subject in a collective labour agreement. In contrast with the present situation, through the social dialogue employers and employees can air their joint visions on the situation 'post-Bosman', and negotiate accordingly.

Financial contribution to enhance employment and the European Social Fund

The European Social Fund aims to facilitate employment within the Community and at enhancing employees' geographical and professional mobility, as well as easing adaptation to changes in business and in production, in particular through professional training and retraining.

Given the specificity of the professional football sector this fund can also serve in the redistribution of money in football. One might also consider that a certain percentage of revenues from media rights could be deposited in this fund. The money should subsequently be invested in guaranteeing amateur football, training young players, developing clubs, in short: ‘for the good of the game’.

Employment conditions for subjects of third countries living legally in Community territory
Uniformity among European member states is desirable in this respect. There is currently no uniform arrangement on the admittance of employees from third countries. There is also no uniformity on the provision of employment licences. Furthermore, there are differences in the fiscal regulations applying to employees from third countries.

4.3.12 Subjects outside the scope of article 137

Discussion now follows on matters which cannot be declared mandatory in a directive, but which can form part of a collective agreement at the European level. Such matters have formed a red thread running through professional football in recent years. Each subject addressed here justifies a thorough investigation in itself. This survey only sheds light on the basic ideas, and only aims at emphasizing that consultation on these matters and agreement at a European level are both possible.

Introduction of a salary cap

Player salaries are the clubs’ largest expense. Increasing competition keeps pushing up salaries. Such increases are now so excessive that clubs often spend more on salaries than they receive in revenues. On average 60% of Dutch club revenues are spent on salaries, and the situation has long been thus. The imminent problems are obvious: salaries rise, revenues drop. Clubs go bankrupt or (in the smaller leagues) there will be an even greater exodus of top players.

A salary cap is in place for a number of sports in the United States, where it is also part of a so-called collective bargaining agreement, whose concept will now be discussed.

A salary cap comes in two forms: hard or soft. A hard cap links the salary to a maximum amount that an employer may spend on salaries. A soft cap also links the money to a percentage the employer may maximally spend on salaries; but this percentage is linked to the revenues the club generates in a season. With a soft cap the salary limit can be subject to deviation under some circumstances.

A soft cap is more relevant to football. In practice a salary cap creates financial stability in the sector. The current situation in European football can be compared with the problems the NBA had to cope with in 1984. The spur for introducing a salary cap in professional basketball was the economic crisis affecting many clubs. This crisis disappeared after a few years.

It must be noted here that a salary cap can only be introduced successfully across the entire EU – in other words it is trans-national.

Image rights

Image rights contracts are the basis for a new transfer system. Given the ever-increasing media interest in football, the advent of new technology and the ‘Hollywood’ status of football players, image rights have become increasingly important in the sector.

It already often happens that a player entering into a fixed-term club employment contract also concludes a contract covering his image rights. This contract agrees that the club has the right to profit from the player’s image rights. These contracts are concluded for a longer period than the employment contract. When the player reaches the end

of his employment contract, the old club can have the new club buy out the image rights contract. Of course, the new club wants to make use of the player's image.

Media: revenues and the sale of broadcasting rights

The sale of football match broadcasting rights has long been a topic for discussion. In certain cases ownership of the broadcasting rights is unclear. The rules applicable to this differ for each member state.

There is also the question as to who should share in the profits from media revenues. Several parties believe they can claim these. First in line are the players and the clubs.

The social dialogue makes it possible to take a joint standpoint on this and to contemplate collective exploitation of distribution percentages. The fact is that internal distribution of a part of the sales profits can positively affect the fostering of football solidarity.

Agent regulation

At the moment FIFA rules apply to 'players' brokers'. The regulations include a form of code of conduct for brokers. Brokers, or agents, negotiate contracts for players and introduce talent to clubs. They also have a commercial interest in managing the affairs of as many football players as possible. Agents' searches for talent often lead to unrest within the player group, and in the club. These are just some of the reasons for drawing up a code of conduct.

It is conceivable that employers and employees want to negotiate the criteria which agents must meet. For example, the IAFA could also participate in these negotiations. This is an interest group for agents established by Rob Jansen.

Other matters

This chapter has considered a number of matters which have affected professional football in Europe in recent years. This is merely a small selection of the topics which could be discussed by social partners at a European level. Among the potential topics are drug rules, football hooliganism and stadium policy, the building of new stadiums and the international match schedule, none of which warrant further discussion here, even though they are certainly subjects of great concern to both employers and employees.

4.3.13 Sporting Rules

The regulations of the football world do not mention anything concerning social dialogue or the need for a social dialogue.

Recently the UEFA has established a so-called "football dialogue" in which the UEFA, the FIFPRO and the EPFL participate. This football dialogue currently focuses around the topics of spectators violence and doping. The football dialogue cannot be defined as a social dialogue in the sense of the EU Treaty.

4.3.14 Conclusion: First a European Commission initiative?

Already from the moment that the European Commission (statement of the joint commissioners Diamantopoulou, Monti and Reding) wrote the letter to confirm the application of the transfer system they urged the FIFA and UEFA to pursue the clubs to start a social dialogue. This never led to a concrete action from the side of the governing bodies.

The European Commission has funded three projects concerning the creation of awareness about the EU social dialogue. Currently the EC is carrying out a research about the feasibility of the creation of a EU SD committee in football.

The main aspect that needs clarification at this moment is the party that is going to represent clubs (employers) as the social partner in a Social Dialogue.

4.3.15 Who represents the clubs?

A Social Dialogue could be very beneficial for the football sector. The sector could regulate itself by means of negotiations between the players and the clubs. It would be a division of powers in line with the views of the EU according to, amongst others, the Helsinki report.

In a transparent and uniform way formal regulations can be created, the starting point already exists.

A difficulty arises when the clubs are grouped in leagues and these leagues fall under the direct control / management of the national associations. These national associations are the governing bodies of the national game and members of FIFA and UEFA. In various EU communications, such as the Helsinki report, it has been made clear that the associations do not have a role in the representation of only one party in football: the governing bodies regulate the game and need to defend the interest of the sport as a whole, players as well as clubs.

If the EC would grant the leagues the power to construe a SD committee and represent the clubs as employers the complete European Model of Sport is in danger.

The EC needs to present a clarification of its point of view in this matter.

4.4 Miscellanea

4.4.1 Trademarks in EC law

4.4.1.1 Introduction

Intellectual property law is a broad description of a range of laws including patents, copyright and trade mark. At their core these laws protect the exclusive enjoyment of rights by the proprietor of them. Trade marks in particular have been used extensively in the sports industry to protect sporting brands. The issuing of trade marks is a matter of national concern. In the UK the law relating to trade marks is governed by the Trade Marks Act 1994 which implements Community Directive 89/104 on the approximation of trade mark laws in the EU. The Act defines a trade mark as a word, logo or colour scheme applied to goods and services. Following registration at the Patents Office the trade mark proprietor holds exclusive right to use it. Unauthorised use of an identical or similar trade mark by a third party constitutes a breach of the Act. The other member states of the EU have their own arrangements although they must be in accordance with Directive 89/104.¹²⁹ There exists a Community interest in this field in order to avoid a situation arising in which the Single Market is divided on national lines, thus disturbing the free movement of goods and free competition. Therefore the legal framework covering intellectual property centres primarily on Article 81 and 82 EC and Articles 28-30 EC (free movement of goods).

Community interest in the specific field of trade marks has been shaped by ECJ jurisprudence. In *Centrafarm* the ECJ held that ‘as regards trade marks, the specific object of commercial property is inter alia to ensure to the holder

¹²⁹ For a review see, Blackshaw, I. S. & Siekmann, C.R. (2005), *Sports Image Rights in Europe*, T.M.C. Asser Press.

the exclusive right to utilise the mark for the first putting into circulation of a product, and to protect him thus against competitors who would take advantage of the position and reputation of the mark by selling goods improperly bearing that mark (para 8). The existence, in national laws on industrial and commercial property, of provisions that the right of the trade mark holder is not exhausted by the marketing in another member state of the product protected by the mark, so that the holder may oppose the import into his own state of the product marketed in another state, may constitute an obstacle to the free movement of goods (para 9)¹³⁰. Therefore the ECJ would recognise the existence of trade marks and protect the right of the proprietor to initially place goods into the market and protect them from improper marketing by competitors. This is important for the trade mark holder as a trade mark on a product provides them with the ability to maintain the goodwill associated with the product in question in that a trademarked product informs the purchaser of the origin of the product thus marking it as distinct from other products. However, trade marks cannot be used to impede the free circulation of goods even where national law permits. This was repeated in *Hoffman-La-Roche* where the European Court of Justice considered the case of a company (again Centrafarm) who purchased drugs in the UK which were then re-packaged and sold in Germany. This drew complaint from the German trade mark proprietor (*Hoffman-La-Roche*) who claimed for trade mark infringement¹³¹. The ECJ stated that it is necessary to consider whether the enforcement of the trade mark would amount to a ‘disguised restriction on trade between member states’.

Trade mark law in the EU is governed by Directive 89/104 and Council Regulation 40/94. The Directive states that national trade mark laws contain disparities which may impede the free movement of goods and freedom to provide services and may distort competition in the common market. To this end the Directive requires member states to achieve greater, although not total, approximation of their trade mark laws. Article 5(1) of the Directive establishes that the trade mark proprietor is entitled to prevent all unauthorised third parties from using in the course of trade ‘(a) any sign which is identical with the trade mark in relation to goods or services which are identical with those for which the trade mark is registered; (b) any sign where, because of its identity with, or similarity to, the trade mark and the identity or similarity of the goods or services covered by the trade and the sign, there exists a likelihood of confusion on the part of the public, which includes the likelihood of association between the sign and the trade mark’. This covers affixing the sign to the goods or its packaging. Article 6 of the Directive prevents the trade mark proprietor from preventing a third party using, in the course of trade, his own name and address, indications concerning the kind, quality, quantity, intended purpose, value, geographical origin, the time of production of goods or other characteristics of goods or services. It also prohibits the proprietor from preventing the third party using the trade mark where it is necessary to indicate the intended purpose of a product or service, in particular as accessories or spare parts. Article 6 does not explicitly permit a third party from using a trade mark as a badge of support, loyalty or affiliation to the trade mark proprietor. If it did, the third party would not be infringing the trade mark. Council Regulation 40/94 also relates to the approximation of trade mark laws in the EU. Under the Regulation national and Community trade marks now co-exist and to facilitate this, an EU Trade Mark Office was established (based in Spain). In the UK the Community Trade Mark Act 1993 implements the Regulation.

4.4.1.2 *Arsenal v Reed*

In *Arsenal v Reed* the ECJ addressed the issue of trade marks in a sporting context¹³². Arsenal FC are a Premiership football club located in London. They are popularly known as the Gunners and display a cannon and shield as their club crest. In 1989 the club registered the words ‘Arsenal’, ‘Arsenal Gunners’ and the cannon and shield badge as trade marks. This related to articles of outer clothing, articles of sports clothing and footwear. Throughout the 1990’s, football merchandising became a significant source of revenue for clubs and Arsenal, keen to benefit from

¹³⁰ *Centrafarm BV v Winthrop BV* [1974] ECR 1183. Paras. 8 & 9.

¹³¹ *Hoffman-La Roche & Co. AG v Centrafarm Vertriebsgesellschaft Pharmazeutischer Erzeugnisse mbH* [1978] ECR 1139.

¹³² *Arsenal Football Club plc v Reed* ECJ, 12/11/02, Case C-206/01.

this revenue source, wanted their supporters only to buy official Arsenal products. They were frustrated from doing so by the actions of local trader Matthew Reed. Since 1970 Mr Reed sold football merchandise such as hats and scarves outside the Highbury stadium, Arsenal's home ground. Mr Reed's products typically contained the labels 'Arsenal', 'Gunners' and/or the Arsenal club crest. Arsenal brought two actions against Mr Reed. The first concerned the English tort of 'passing off' and the second was a claim for trade mark infringement.

On first instance in *Arsenal Football Club plc v Reed* the High Court in England dismissed both claims¹³³. On the tort of passing off, the Court held that Arsenal had not been able to show actual confusion on the part of consumers and, in particular, had not been able to show that the unofficial products sold by Mr Reed were regarded by the public as coming from Arsenal or marketed with its authorisation. On the claim of trade mark infringement, the High Court supported Mr Reed's claim he distinguished between official and unofficial products and that he was not using the trade mark as a 'badge of origin'. In other words, the word or logos on the goods were used simply to adorn the product and not to imply or indicate any affiliation or relationship with the manufacturer or distributors of any other product. The High Court held that when a label or logo that had been trade marked was merely being used as a 'badge of support, loyalty and affiliation' there could be no trade mark infringement. Thus, 'the mere fact that the words or designs are used on an item of clothing does not mean that they are used as a trade mark (...) In my view... the Arsenal Signs on Mr Reed's products would be perceived as a badge of support, loyalty or affiliation to those to whom they are directed. They would not be perceived as indicating trade origin'¹³⁴. Thus it appeared that registering badges as trade marks would not protect them from the commercial exploitation by unofficial traders.

Nevertheless, in the proceedings, the High Court referred to the European Court of Justice the following questions for a preliminary ruling: (1) Where a trade mark is validly registered and (a) a third party uses in the course of a trade a sign identical with that trade mark in relation to goods which are identical with those for whom the trademark is registered; and (b) the third party has no defence to infringement by virtue of Article 6(1) of the Council Directive of 21st December 1988 to approximate the laws of the member states relating to trade marks (89/104/EEC); does the third party have a defence to infringement on the ground that the use complained of does not indicate trade origin (i.e. a connection in the course of trade between the goods and the trade mark proprietor)? (2) If so, is the fact that the use in question would be perceived as a badge of support, loyalty or affiliation to the trade mark proprietor a sufficient connection?

In answer to these questions, the ECJ found 'in a situation which is not covered by article 6(1) of the First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the member states relating to trade marks, where a third party uses in the course of trade a sign which is identical to a validly registered trade mark on goods which are identical to those for which it is registered, the trade mark proprietor of the mark is entitled, in circumstances such as those in the present case, to rely on Article 5(1) (a) of that directive to prevent that use. It is immaterial that, in the context of that use, the sign is perceived as a badge of support for or loyalty or affiliation to the trade mark proprietor'¹³⁵. Thus, the perception of the sign as a badge of support was irrelevant. The use of the Arsenal badge on the unofficial goods would give the impression to third parties of a material link between the goods and Arsenal Football Club. Arsenal would then have their trade mark associated with unofficial goods over which they exercised no control. Mr Reed could therefore not rely on the badge of support defence, nor the defence that he labelled his goods as unofficial. Consequently, he was using Arsenal's trade mark without justification.

The case took an unusual turn on return to the High Court for application¹³⁶. The Judge considered that the ECJ had acted ultra vires by determining as a matter of fact that Mr Reed's use of the marks created the impression that there was a material link in the course of trade between the goods he was selling and the club. Thus the ECJ had ruled on questions of fact rather than law and the Judge, some would say inexplicably, choose to ignore their guidance. The

¹³³ *Arsenal Football Club v Reed* [2001], 2 C.M.L.R.

¹³⁴ *Arsenal Football Club v Reed*. Para. 57-58.

¹³⁵ *Arsenal Football Club plc v Reed* ECJ, 12/11/02, Case C-206/01. Para. 62.

¹³⁶ *Arsenal Football Club plc v Reed* (No. 2) [2003] 1 All E.R. 137, [2003] 1 C.M.L.R. 13.

decision of first instance in support of Mr Reed therefore stood. Arsenal appealed to the Court of Appeal. Here the Court found that the ECJ's finding of fact was inevitable and that the guidance offered by it should have been followed. The Court therefore found in favour of Arsenal¹³⁷.

4.4.1.3 Conclusion

The Arsenal v Reed saga was a curious affair. It represented a reverse of Arsenal's recent footballing fortunes – unbeatable at home, unable to win in Europe. In the Court room they were unable to win at home (defeated twice in the High Court) but were victorious in Europe (with the ECJ judgment). Another curious turn came with Arsenal's decision to change their badge in order to benefit from stronger trade mark protection. Whilst understandable, the decision did not meet with the approval of supporters. Even more curious was the High Court's rejection of the ECJ guidance and further still, the Court of Appeals unusual obiter dicta concerning the uncontested issue of passing off. The Court of Appeal's judgment is under appeal to the House of Lords. The story has thus not ended.

Nevertheless, the ECJ's findings are important for sport in that it clearly supports trade mark owners and adds clarity to the question of whether a sign is being used as a trade mark or a badge of support. Arguably, such a distinction may be considered artificial and one that would not arise in other industries (such as the fashion industry). In this sense, football clubs are themselves brands and wish to be treated in the same way as other retail brands. After all, the decision on the part of the consumer to buy an official football strip is not based purely on the origin of production. It extends to other considerations of which sporting support and allegiance are paramount. The prospect of a trade mark being defeated by a claim of support / allegiance therefore greatly concerned trade mark proprietors, particularly those in the sports industry. They therefore welcome the clarity on the issue of what constitutes trade mark use brought (eventually) by the judgment.

With the sports merchandising business being big business in the modern era, a negative decision for Arsenal would have had major repercussions within the sports industry. The clubs and the major sportswear manufacturers will be relieved by the ECJ's judgment, particularly given that the value of kit sponsorship has been enhanced by the judgment. The ability to limit the sources of club merchandising is an important commercial tool and establishes a monopoly, or near monopoly for them. A position of monopoly for the clubs and sportswear manufacturers may have inflationary implications for the pricing of merchandising and parents of children who wear club merchandising will find little to support in the ECJ's judgment. Nevertheless, the impact on consumers may however be mitigated by two important considerations. The first is that any confusion consumers once experienced in the purchasing of club merchandising should now be removed. However, what the judgment does not clarify is whether the presumption of confusion can be defeated by the presentation of evidence to the contrary. Second, as monopolies clubs and sportswear manufacturers must be mindful that the competition authorities are likely to scrutinise their future market conduct in order to safeguard the interests of consumers. Of course, the real losers in the Arsenal v Reed saga are any traders, other than the big players, who wish to exploit the lucrative sports merchandising market. This particularly affects the small traders whose stalls have become a common feature outside football grounds across Europe.

4.4.2 The Database Right and the Spin-off Theory¹³⁸

Commentators in many quarters, especially in the UK, were surprised by the ECJ's decision in *British Horseracing Board & Others v William Hill* of 9 November last year – which was handed down in conjunction with a number of other European cases also concerning the scope of the database right.

¹³⁷ *Arsenal v Reed* [2003] EWCA Civ. 96.

¹³⁸ Opinion entitled "The Database Right and the Spin-off Theory" by Nick White, Couchman Harrington Associates, London, United Kingdom, forthcoming in *The International Sports Law Journal* (ISLJ) 2005/3.

Under the Database Directive, the database right may arise where the database maker can show that he has made “a substantial investment in ... the obtaining ... of the contents” of a database. The ECJ found that the BHB’s database of runner, rider and race information did not fulfil this test. Their reason for making this finding was essentially as follows:

“The expression ‘investment in ... the obtaining ... of the contents’ of a database must, as William Hill and the Belgian, German and Portuguese Governments point out, be understood to refer to the resources used to seek out existing independent materials and collect them in the database, and not to the resources used for the creation as such of independent materials.”

So, the database right will arise where investment has been made in seeking out and collecting materials but not where the investment has been made in the creation of materials. Although it was not stated in such clear, bald, terms, the ECJ’s view was that the efforts made by the BHB in creating the data, i.e. in the process of receiving, ordering and entering into the database detailed information on horses, jockeys, owners, colours, trainers, meets etc, were not efforts from which a database right could arise. The creation of such data was, in essence, a spin-off of the BHB’s actual purpose, viz. the management, planning and organization of racing and the racing calendar.

The ECJ’s endorsement of this so-called “spin-off” doctrine – the idea that a database right will not arise in respect of a database which is a mere spin-off of another endeavour – should probably not have come as such a surprise as it did. It is a principle fairly well established in Dutch law. Moreover, the Belgian, German and Portuguese Governments all submitted observations in the BHB case encouraging the ECJ to endorse the doctrine.

The BHB may well feel aggrieved at having this ECJ decision go against them. Before the judgment, the Advocate General had delivered an opinion in the BHB’s favour and most commentators believed the ECJ would follow suit – as it usually does. Undoubtedly, things now look fairly bleak for the Board although the Court of Appeal still has to rule on the case. A hearing was set for 28 and 29 June and the BHB will be hoping for another surprise. The Board must have had its reasons for not pursuing a claim under copyright but, in the light of subsequent events, it is probably now wishing it had.

5 Conclusions

The sports sector is composed of a diverse body of stakeholders and interests and there is no consensus on how sport should be regulated by the EU. Some want sport to be exempt from EC law whilst others seek to use EC law to eliminate market restrictions. One's perspective depends on whether sport is defined in purely sporting terms or whether sport is considered an economic activity. In short, there are always two sides to an argument. Indeed, there is only one issue on which all stakeholders agree – the need for legal certainty.

Legal certainty performs a number of important functions: (1) Fairness: similar cases need to be decided on a similar and not arbitrary basis by the EU. This ensures consistency and legitimacy. (2) Certainty: legal certainty amends people behaviour by constructing legitimate expectations. If the law is known and is relatively predictable, sports bodies will amend their constitutions in accordance with EC law thus reducing the potential for conflicts. Certainty requires good quality legal reporting and it is important that the EU continues to effectively communicate the legal framework to the sports sector. (3) Efficiency: very few cases are completely new – they invariably involve similar circumstances and points of law. Given the costs involved in litigation and the finite resources of the European Commission, legal certainty in the sports sector provides for existing solutions to be applied to similar problems thus saving time and money for everyone involved. (4) Flexibility: legal certainty should not be so rigid as to create market anomalies. It should be flexible enough to adapt to changing economic conditions.

The EU should not impose legal certainty on sport for two reasons. First, the primary responsibility for running sport should lie with the sports bodies themselves. They have acquired the necessary skills to regulate sport. Second, the EU is not yet constitutionally competent to develop a sports policy. It should confine its role to supervising the choices made by the sporting bodies to ensure they are consistent with EC law. In order to assist sport with this the EU can provide for legal certainty via one, or a combination of the following policy options:

- Option 1: Case by Case Analysis
- Option 2: Social Dialogue
- Option 3: Soft Law
- Option 4: Treaty Revision
- Option 5: Block Exemption

Option 1: A Case By Case Analysis

Although characterised as an 'option', the case by case analysis is in reality a necessary and inevitable methodology for the Court and Commission to adopt as it is the right of individual litigants and complainants to bring their cases before the pertinent judicial bodies. The case by case method is also an inevitable response to the need to regulate new sectors in which legal principles have yet to emerge. The case by case method has been favoured by the EU and it is still employed today. From within this method is emerging a more stable and clarified legal environment based on the location of sporting rules and practices within one of three categories. This framework applies to both free movement and competition law cases:

Category 1 Rules: These are sporting rules or practices which fall outside the scope of the EC Treaty's free movement and competition law provisions. These rules or practices either fall within the scope of the sporting exception (non economic rules / sporting interest only rules) or are deemed incapable of constituting a restriction following a rule of reason analysis in which the rule in question, even though having economic consequences, is considered to be inherent to the proper functioning of the sector.

Category 2 Rules: These are sporting rules or practices which are economic in nature and which do constitute restrictions and are thus subject to the EC Treaty's free movement and competition law provisions. However, such rules or practices are capable of objective justification thus removing them from the relevant prohibitions in free

movement and competition law. The use of the exemption criteria contained in Article 81(3) is an example of how restrictive rules can still be lawful. These rules and practices must remain proportionate to the objectives pursued.

Category 3 Rules: These are sporting rules or practices which do constitute restrictions and are prohibited by the EC Treaty's free movement and competition law provisions.

Assessment:

Fairness: The case by case method is procedurally and substantively fair as cases are decided on their merits. However, the *Wouters* criteria should be applied instead of the current ones which are arbitrary. See, Professor Stephen Weatherill, Jacques Delors Professor of EC Law, Oxford University, United Kingdom: "Anti-Doping Rules and EC Law" (E.C.L.R. (2005) pp. 416-421), criticizing the verdict of the European Court of Justice in the *David Meca-Medina and Igor Majcen v. Commission* case of 30 September 2004: "The rules of the EC Treaty governing competition and free movement apply only where, after assessment of the overall context in which the sporting decision was taken or produces its effects and after account is taken of its objectives, the consequential restrictive effects go beyond those inherent in the pursuit of those objectives. Or, seen from the other side of the coin, consequential restrictive effects of a sporting decision which cause economic hardship are not treated as restrictions for the purposes of application of Articles 49 and 81 of the EC Treaty *provided they are inherent in the pursuit of those objectives*" (italics added). In the forthcoming article "Is the pyramid compatible with EC law?" (The International Sports Law Journal (ISLJ) 2005/3-4) Professor Weatherill elaborates the question what the pre-conditions are for reliance by governing bodies on the notion that rules necessary for the organisation of the game (in the case under review, that is, the player's release system for national teams in professional football) may escape the scope of application of the EC Treaty, as follows: "My summary of the criteria which shape the conditional grant of autonomy to governing bodies holds that the rules must be: transparent - objectively justified - necessary - proportionate - and must allow appropriate levels of participation by those affected."

Certainty: The case by case method establishes legal certainty based on the construction of the framework described below. It should however be pointed out that not all Commission competition decisions are concluded via formal Decisions. The continued use of soft law in this field has the potential to undermine legal certainty.

Efficiency: The use of informal methods to settle competition law cases is efficient in that it is less time consuming and expensive than formal investigations and Decisions. The case by case analysis is however inefficient given that it encourages speculative complaints. It is also growing increasingly difficult to apply the sporting exception given that most sporting rules and practices contain economic consequences. Nevertheless, the case by case method is contributing to the emergence of a more settled and clarified legal environment based on the below framework which should begin to amend market behaviour.

Flexibility: By adopting orthodox free movement and competition law analyses involving sports cases, the case by case method is flexible enough to accommodate changing market conditions in which sport operates. The Table below outlines the current state of play.

Table 1: Framework for Applying Internal Market Rules to Sport

Category 1 Rules: Rules outside the scope of the EC Treaty	Category 2 Rules: Rules within the scope of the EC Treaty but capable of justification	Category 3 Rules: Rules prohibited by the EC Treaty
Nationality restrictions in the composition of national team sports (Walrave).	The use of non-discriminatory transfer windows (Lehtonen).	Nationality restrictions in the composition of club sport (Bosman).
Rules relating to selection criteria (Deliège).	Collective sale of broadcasting rights (UEFA)	End of contract transfer payments (Bosman).
Sanctions for doping offences in sport (Meca-Medina).	Collective purchasing agreements for broadcasting rights.	The use of discriminatory transfer deadlines for players (Lehtonen).
Rules preventing club relocation (Mouscron).	Restrictions on the cross border transmission of sport (UEFA's Broadcasting Regulations).	Nationality rules in breach of directly effective non discrimination provisions contained in association Agreements (Kolpak, Simutenkov).
Rules preventing multiple club ownership (ENIC).	Ticketing arrangements (France '98)	Periods of long exclusivity for sports rights (KNVB/Sport 7).
The granting of 'educational' state aid to sports clubs (French Professional Sports Clubs).	In contract transfer payments (FIFA Regulations on international football transfers)	Export bans for sports goods (Dunlop Slazenger & Tretorn).
	Rules regulating players' agents (Piau).	Abusive regulatory rules designed to maintain commercial dominance (Formula One).

Issues yet to be settled: salary caps, home-grown players, player release clauses, break-away leagues, Social Dialogue, licensing, state aid and also investment funds, Service Directive (cf. below under Q&A).

Option 2: The Social Dialogue

Already in July 2001 the joint commissioners Diamantopoulou (social affairs), Reding (culture, media and sport) and Monti (competition) urged FIFA and UEFA to pursue the clubs and players to start a Social Dialogue on an European Union level. The Social Dialogue, which is embedded in the Treaty articles 137 and 138, brings the Social Partners, workers and employers, around the table and enables them to create a regulatory framework for the economic sector in which they operate. The Social Dialogue is already successfully introduced in more than 25 sectors and is currently in a developing stage in the EU professional football sector. A well functioning Social Dialogue leads to a “tailor made” legal organisation of the sector, in football such a regulation could be described as a collective bargaining agreement.

Assessment:

Fairness: In a well functioning Social Dialogue the relevant stakeholders are involved. In the case of football these stakeholders would be clubs and players. In a consulting stage, however, other stakeholders in the economic sector can be involved such as the governing bodies and player agents. Therefore the Social Dialogue can be characterized as a “fair” instrument: the stakeholders are enabled to organize and regulate their own sector in the “shadow” of the European Commission.

Certainty: The Social Dialogue may lead to various results. These may vary from joint opinions of the social partners to, ultimately, the creation of a directive specific for sports or football. Therefore the level of certainty depends on the result: a directive is binding upon every member state and prevails over national law. This would lead to absolute legal certainty. A joint opinion does not lead to legal certainty as it is more a tool for lobbying. The certainty aspect is characterized as a gliding scale.

Efficiency: There are two ways of approaching the efficiency criterion. Once a Social Dialogue committee has been established there is a high level of efficiency: the Social Partners agree after mutual consultation and implement their agreements in the national practices of the member states. This leads to a high level of efficiency.

On the other hand, however, it is still needed in this period of time, to establish a Social Dialogue committee in football. It takes a serious amount of time to identify relevant social partners. One of the main aspects that obstructs efficiency is the identification of relevant representatives of the employers (clubs). In the current situation there exists a serious dilemma as regards the appointing of the social partner from the employers’ side. If organisations are appointed as part of a Social Dialogue committee that are directly subordinate to the associations then the European Model of Sport will be scrutinized; this would lead to an unclear situation and not to efficiency. It may be observed that by introducing EPFL, the European organisation of national Premier Leagues, in fact the “pyramid structure” is “repeated” in the Social Dialogue since EPFL is closely linked to national FA’s and UEFA.

Flexibility: The aspect of flexibility can certainly be found in a Social Dialogue. The Social Partners can adapt quickly to a changing legal environment in their specific sector.

Option 3: The use of Soft Law

Due to the ratification difficulties of the Constitutional Treaty, the continued use of soft law may be employed by the EU to influence the manner in which the EU’s legal framework is applied to sport. Previous soft law initiatives (such as the Amsterdam Declaration, Helsinki Report and Nice Declaration) have been influential and have been cited in ECJ and Commission jurisprudence. Caution needs to be exercised in this respect as the EU is not competent to formally involve itself in sports policy.

Assessment:

Fairness: A question mark must remain over the procedural fairness of the EU involving itself in sports policy when the Treaty does not explicitly allow for this.

Certainty: As the EU is not bound legally by soft law, its use cannot be said to create legal certainty although previous soft law initiatives in sport have been influential in informing how EC law is applied to sport. The use of soft law has the potential to influence the case by case analysis described above.

Efficiency: The use of soft law is politically efficient as it allows the member states and other EU actors to influence sports regulation without having to undertake the complex and time consuming task of revising the Treaty.

Flexibility: The use of soft law is highly flexible in that the EU is not bound legally by such acts and as such can alter the content of them to suit current conditions.

Option 4: Treaty Revision

A revision to the Treaty to include sport could take a number of forms:

Option 1: The Constitutional Treaty approach (soft sports policy option). This soft approach would see sport being linked with other EU policies (in this case Education, Youth, Sport and Vocational Training). A general statement on the specificity of sport would be included to influence the nature of EU sports regulation. The Constitutional Treaty did not include a specific horizontal integration clause which would place an obligation on the EU institutions to take sport into account in defining and implementing other EU policies and activities.

Option 2: Sports Article (hard sports policy option): This option was favoured by the Portuguese Government during the Constitutional Convention deliberations. It would involve the construction of a single sports policy based in a single sports article. General statements on the social characteristics of sport would be made and a clear statement made on the need only to regulate the economic aspects of sport. Support for the construction of social dialogue between the social partners could be articulated.

Option 3: Sports Article (sporting exemption option): This option was favoured by the International Olympic Committee during the Constitutional Convention deliberations. It would see a strong statement made in a specific sports article on the special characteristics and autonomy of sport. Individual protection for specific sporting rules could be articulated and a horizontal integration clause could be incorporated into the text. Such as clause would place an obligation on the EU institutions to take sport into account in defining and implementing other EU policies and activities.

Option 4: Specific Treaty Exemptions: An amendment to Articles 39, 81 and 82 would provide sport with exemptions from free movement and competition law. In respect of free movement, the exemptions contained in Article 39 could be broadened to include sport (currently only public order, public safety and health). With regard to competition law, Articles 81 and 82 could be amended to provide exemptions from competition law.

Option 5: Article 86(2) EC. Article 86(2) potentially allows for an exemption from Treaty principles if undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly can demonstrate that the application of the competition rules would obstruct the performance of tasks assigned to it. The prospects of such a move are however remote. Member states would have to take legal steps to create these entrusted sporting undertakings, as undertakings created by private initiative would be excluded. It is

not only unlikely that member states would be willing to take such a step, it is also unlikely that sports organisations would see this move as desirable.

Option 6: Sport could be added to the list of EU activities outlined in Article 3 of the Treaty. Article 308 of the Treaty states that, 'if action by the Community should prove necessary to attain, in the course of the operation of the market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures'. Combining Article 3 with this 'catch-all' Article would permit action by the EU in sports matters if it was felt appropriate for the attainment of one of the objectives of the Treaty. Conceivably, this method could be employed in support of sport's educational and cultural qualities.

Option 7: Sports Protocol: This option was favoured by UEFA during the Constitutional Convention deliberations. UEFA calculated that a sports protocol, worded in similar fashion to the IOC sports article proposal would protect the specificity of sport by giving legal substance, clarity and consistency of application to existing political declarations, principles and Treaty provisions without further extending Community competence in sport. As a fall back position, UEFA also supported the IOC proposal described above.

Assessment:

Fairness: Treaty revision would be procedurally fair as it is agreed via established constitutional means. The substantive fairness of granting sport constitutional protection is questionable and would lead to calls by other sectors for similar constitutional protection.

Certainty: Treaty incorporation for sport would not necessarily create legal certainty unless the provision was precise (such as a general exemption for sport). A case by case analysis would still be required in order to interpret the Treaty provision.

Efficiency: Treaty revision is politically time consuming as member state unanimity is required to reach agreement and not entirely efficient as a case by case analysis would still be required to interpret the provisions.

Flexibility: Arguably, the softer the form of words contained in the Treaty the greater the flexibility. The use of the catch all Article (308) offers the greatest flexibility.

Option 5: Block Exemption

The Commission has the option of issuing block exemption Regulation for sport which would exempt particular sporting practices from the application of Article 81.

Assessment:

Fairness: This option has yet to find favour with the EU's competition authorities. Procedurally, a wide consensus on the need for block exemptions is preferred by the Commission and as yet no such consensus exists. This makes the block exemption an unlikely, although potentially long term option. As EU jurisprudence in the sports sector develops, so a line of reasoning on sport will emerge which could potentially persuade the Commission to explore the feasibility of such an exemption.

Certainty: For block exemptions to be issued the Commission must first have gained sufficient case law experience. It is questionable whether the Commission has yet acquired sufficient familiarity with sport to make this judgement

Efficiency: The issuing of block exemptions requires a wide and lengthy consultation process with industry. However, precedents for block exemptions do exist and potentially such exemptions, if carefully conceived, can reduce the number of individual exemption requests. The under-resourced Commission would welcome any significant reduction.

Flexibility: Flexibility can be maintained with the use of block exemptions as temporal restrictions are placed on their scope.

Assessment of the Options

In order to establish legal certainty for the sports sector the EU should continue its policy of promoting policy options 1, 2 and 3 above. This involves (1) using established free movement and competition law analyses to dispose of sports related cases on a case by case basis (2) promoting social dialogue between the social partners (3) constructing policy guidelines on sport through soft law initiatives and communicating these to the sports sector. The benefits of this approach are summarised below:

Option 1: A case by case analysis of sporting disputes: This option fulfils the legal certainty criteria of fairness and certainty although initially it is inefficient as it is costly and time consuming. It also allows for maximum flexibility in order to accommodate changing market conditions in the sports sector. The use of the sporting exception, the rule of reason analysis and the exemption criteria contained in Article 81(3) provides for maximum flexibility in dealing with the specificity of sport without allowing serious restrictions to escape the reach of the Treaty. However, in modern sport it is increasingly difficult to apply the sporting exception to sports rules and practices. This is because most sporting rules and practices contain economic consequences. The rule of reason analysis should be preferred in which prima facie restrictive agreements receive careful examination with proper account being taken of the overall context in which a decision restricting free movement / competition had been made, paying particular attention to the objectives of the rule in question. This analysis could be employed to either remove sporting rules and practices from the scope of free movement and competition law (category 1 rules) or provide the necessary analysis to objectively justify restrictions (category 2 rules).

Option 2: Social Dialogue: This option fulfils the fairness criteria as the social partners themselves define their relationship. Once in force a collective bargaining agreement also ensures certainty. The process of social dialogue is slow. Flexibility maintained as agreements are renewed.

Option 3: Soft Law: This option is questionable on procedural grounds given that the EU has no competence to develop a sports policy. As the EU is not bound legally by soft law, legal certainty is not created although soft law initiatives in sport do inform the case by case analysis of the ECJ and Commission. The efficiency criteria is fulfilled as it allows the member states and other EU actors to influence sports regulation without having to undertake the complex and time consuming task of revising the Treaty. The use of soft law is also highly flexible in that the EU is not bound legally by such acts and as such can alter the content of them to suit current conditions.

Questions & Answers

Freedom of movement issues:

Home-grown players

Q: Are UEFA's home-grown player rules compatible with EC Law?

A: Although UEFA's rule is neutral in terms of nationality the measure is indirectly discriminatory as a higher proportion of nationals than non nationals are likely to meet the home-grown criteria. These players are thus likely to be disadvantaged with respect to access to employment and consequently the rule is likely to be considered a restriction under Article 39 EC. Previous case law (Bosman) does not support the proposition that the rule falls within the scope of the sporting exception. This restriction then requires justification (see 2.1.1). UEFA's justifications would centre on (1) encouraging youth training programmes, (2) promoting local / national identity with clubs, (3) maintaining competitive balance by encouraging less reliance on the transfer market for players, and (4) widening the pool of talent within an association eligible to represent the national team. In various forms the EU has accepted some these objectives as legitimate. For instance in paragraph 106 of the Bosman judgment and paragraph 11 of the Nice Declaration on Sport (2000) the objectives of maintaining competitive balance and the encouragement of training programmes has been considered legitimate although they are still subject to the proportionality test. Nevertheless, UEFA's case may be undermined by a number of factors: (1) The home-grown player rule has the potential to restrict cross border labour mobility and the ECJ has traditionally taken a hard line on the issue of justifications. For example, in Bosman the ECJ rejected concerns about club identity and the impact on national teams (para. 131-134). (2) The home grown player rule may encourage the hunt for young talent in Europe in contradiction to the EU's desire to protect young players from commercial exploitation (see para 13 Nice Declaration on Sport). (3) More appropriate and less restrictive means of pursuing the legitimate objectives may be open to UEFA. Such measures may include salary capping or providing financial inducements to clubs prepared to nurture talent. (4) Clubs may object to the imposition of unfair trading conditions on their activities (the need to invest more in youth training programmes) meaning that this issue could also be considered under Articles 81 and 82 EC.

Salary caps

Q: Are the use of salary caps compatible with EC Law?

A: The use of salary caps in football has been suggested as a solution to the problem of clubs spending unsustainable levels on player wages in order to compete at the highest level. Salary caps are by definition restrictive. Depending on the form they take they restrict the amount clubs can spend on wages thus restricting the supply and demand for players. Capping is therefore likely to be considered an issue for EU competition law. Careful consideration should be given to the overall context in which the decision to employ a salary cap was taken. An environment of economic crisis in football would make salary caps more likely to survive legal challenge. In this environment, salary caps may be justified on the grounds that they maintain the economic viability of teams competing in the league and they preserve competitive balance between clubs. Arguably, salary caps are too economic in nature to fall within the scope of the sporting exception. Therefore salary caps may be subject to a rule of reason analysis and defined as inherent in the proper functioning of sport and thus excluded from the scope of Article 81. Alternatively, the salary caps may be considered suitable for an exemption under Article 81(3). Much depends on the nature of the cap (hard or soft), the existence of less restrictive means of achieving the stated objectives and the definition of the market and whether caps have an appreciable affect on it. Some commentators have argued that the softer the cap the harder the law should intervene.¹³⁹ If the objective of the cap is to safeguard competitive balance then a hard cap should be preferred as this imposes a flat ceiling on the spending of all clubs

¹³⁹ Hornsby, S. (2002), The Harder the Cap, the Softer the Law? *Sport and the Law Journal*, Vol. 10, Issue 2, p142-149.

whilst a soft cap, which links spending to revenue, disproportionately affects the ability of small clubs to improve their position. This places them at a competitive disadvantage and at risk of closure. Competition law, which is designed to promote competition, could not sanction a system which curtails competition to this level. Consequently, a hard cap is more likely to pass a rule of reason analysis and be defined as falling outside the scope of Article 81. The fact that a hard cap is more restrictive and less appealing to the larger undertakings and high earners is not relevant under this analysis. So long as players have the rights of free movement to seek alternative employment, a hard cap should not amount to a breach of competition law. To achieve maximum legal certainty in this field the international players union (FIFPro) must give their consent to such a move although high earning players are less likely to consent to a hard cap. Consent could be provided through a collective bargaining agreement with the employers (clubs). See sections 4.3 for more discussion.

Investment funds

Q. Is the current trend of the use of Investment Funds by clubs in order to maximize the budget to buy players in correspondence with European Union legislation?

A. A players fund is a means to maximize the budget of a professional football club in order to facilitate the acquisition of players by the club. This extra budget is created by attracting external investors and involve these investors in the acquisition of players.

These external investors receive a return on investment which is created when a player moves from one club to another. In the professional football world this movement of players is called a transfer. The highest return on investment for the investors is gained when a player is “sold” at the moment when he is worth the most.

The external investors receive the federative rights of the player. This means that they receive their money back, including a profit, when the player is registered for his new club at the national federation.

In order to avoid an infringement of article 39 of the Treaty regarding the free movement of workers, it has to be guaranteed that the external investors, gathered in the fund, not have a decisive vote in the movement of the player. An infringement of the free movement of workers can occur easily through clauses in a contract or by means of a factual practice.

It is therefore recommended to define criterions to safeguard the free movement of workers and to control the authority of the investment funds over the players.

Another aspect is that the stability of contracts is possibly being endangered due to the fact that transfers are more profitable if a player leaves a club (breaches his contract) if he still has a long term of the contract left. This endangers a level playing field.

The best investment is a young football player. It is needed to keep a close watch on possible abuse of youngsters in the light of this topic.

Service Directive

Q. Is the Draft Service Directive (“Bolkestein Directive”) applicable to professional sport?

A. The aim of the directive is to establish a legal framework to facilitate the freedom of establishment of service providers in Member States and the free movement of services between Member States. The proposal therefore aims to remove all barriers to the effective exercise of these two fundamental freedoms of the EC Treaty.

Two main points can be identified in the Directive:

1. The abolition of the necessity of licenses to carry out certain services;
2. The principle of the Country of Origin, this means that a service provider is subject only to the law of the country in which it is established.

The Service Directive is applicable to every form of services which can be defined as being an economic activity. It has been made clear in European Court of Justice jurisprudence that professional sport is an economic activity and that Community laws and legislation is fully applicable to professional sport, unless sport specific matters are at stake such as the selection criteria for national teams.

In the professional sports sector many service providers could fall under the Service Directive, examples shall be given below.

Every trainer / coach / instructor / physiotherapist / medic / referee are covered by the service directive under its current phrasing. These persons provide a service against a remuneration and are, in the majority of the cases, not attached to the organisation by means of a contract of employment. These professions are common in every sporting discipline. Under the Service Directive it could become possible that a tennis coach in Germany does not need a specific license to perform his services in Germany and that therefore he may deliver the same services in the Netherlands, even if the Dutch Lawn Tennis Association has put specific regulations in order to regulate the profession and requires a specific license.

As regards to football the following situation is tangible. A player agent in for example France may carry out the profession of a football agent without a specific FIFA license, or in the Netherlands even without any license at all. In principle a FIFA license is needed for player agents to operate internationally according to the FIFA Player Agent Regulations. If the Service Directive comes into force the FIFA Player Agent Regulations will lose their effect on the territory of the EU.

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Competition issues:

Player release clauses

Q. Are UEFA's player release clauses compatible with EC Law?

A. The G14 group, has joined a lawsuit by the Belgium club, Charleroi, against FIFA. The G-14 demands compensation payments for players on international duty and states that FIFA abuses its dominant position (art. 82 EC). According to Stephen Weatherill, Jacques Delors Professor of EC Law, Oxford University, United Kingdom. player release clauses may violate Article 82 EC. In his view it is not necessary to establish these arrangements to the formal exclusion of the participation of clubs. Although he admits that the exposure to wider audience raises the value of the player, he claims that this is not a reason for arguing for a system of mandatory and uncompensated release of the extreme type that currently prevails. Since there are no justifiable grounds, the FIFA's refusal to contribute towards players' salaries might well be held illegal.

In fact, the central issue of the Charleroi v. FIFA case reaches beyond the player release issue *sec*, since the pyramid structure of European professional football as such is challenged. It is a "governance" issue, it is a question of proper co-management between the international governing bodies (UEFA and FIFA) and G-14 providing many national team players. Simply speaking, the Charleroi v. FIFA case is about the rights of the clubs in economic issues.

Licensing

Q. Are UEFA's licensing clauses compatible with EC Law?

A. Licensing agreements are anticompetitive agreements, in that they prevent or restrict access to the market by certain f.e. economic requirements. On the other hand, a European licensing system, for football clubs within Europe, improves the integrity of the competition and serves the equal treatment of clubs. Licenses can, in the absence of harmonisation, be accepted in case the following criteria are met:

Non-discriminatory; this means the rules must be equally valid; national associations must deal with these issues in a similar matter; Objectivity; Proportionality; the rules must go no further than is reasonably necessary to protect the legitimate interest of the association; Subsidiarity; there are no less restrictive means to pursue the legitimate objectives; and, Transparency.

A decision of the National Competition Authority of Belgium (No. 2004-E/A-25 of 4 March 2004) involving the Belgium FA is a good example of allowing a licensing system as a means for the preservation of a balanced competition.

State aid

Q. Is state aid compatible with EC Law?

A. State aid can take all kinds of forms, from tax measures to subsidies and gifts. Local authorities are especially keen to show their involvement with their local teams by acting as ‘sponsor’. The European Commission stated that support within the framework of the national school system as well as the infrastructure may (possibly) fall outside the scope of application of Section 87 of the EC Treaty. Other financial support to see to it that clubs do not go bankrupt, may be in contravention of the Community rules (Sections 87 and 88 of the EC Treaty). It is interesting to note that the emphasis in the entire discussion about state support to soccer clubs is based on local social arguments, while no realistic considerations with respect to competition law are put forward. Where state support to soccer clubs is concerned, we would argue that it is preferable to weigh the arguments at national or European level. Every argument dealt with on local level will conflict with “local emotions”. These powerful emotional forces might influence local politicians and mystify the need to apply the state-aid rules.

Social Dialogue

Q. Is a Social Dialogue, as defined in the EU Treaty, possible in the EU professional football sector?

A. The Social Dialogue is a consultation platform that consists of organisations which represent both sides of the industry, namely employers and workers or social partners. A social dialogue in professional football may lead to the creation of legal certainty in the EU professional football sector due to the fact that conflicts of law, deriving from the difference in hierarchy of the laws, are avoided. Regulation through a Social Dialogue would be EU law based. Aspects that could be regulated in a transparent way are a transfer system, standard contracts, education and social security aspects, etc.

The European Commission has officially urged FIFA and UEFA to pursue the clubs to start a Social Dialogue.

In order to establish a Social Dialogue the social partners need to respect the following criteria in order to be granted access to a committee:

- The organizations must be representative at branch-coordinating, branch and professional levels and must be organized at a European level;
- They must consist of organizations which themselves form an integral and recognized part of the member states’ social partner structures, they must be empowered to negotiate agreements, and as far as possible they should be representative for all member states;
- They must have adequate structures enabling them to take part effectively in the consultation process.

At this moment there is a workers union that represents the abovementioned criteria, the Fédération Internationale de Footballeurs Professionnels (FIFPRO). This organisation has carried out several European Commission funded projects to promote the Social Dialogue.

From the side of the employers there have been various initiatives culminating in the appointing of the European Union Premier Football Leagues (EPFL) organisation. It is until today still unclear if this organisation is able to represent the employers in the EU. The main difficulty is that the majority of the Leagues in the European Union are subordinate to the national association. If the grouping of the leagues would be recognized as the representative of the employers there could be a conflict of interest, as the national associations are unable to represent employers in the Social Dialogue. Ultimately a Social Dialogue could lead to the adoption of a Directive with the power of direct effect; this would mean that the associations would have a direct say in the making of law in the EU.

It is therefore necessary to closely analyze the developments in the Social Dialogue in football and to identify the right parties and organisations.

An important aspect that needs to be taken into consideration is the position of G-14 (which has received an official mandate to represent its member clubs on an EU level). G-14 in financial terms covers 35% of the professional

football market in the EU and is the only real international clubs (employers) organisation in the EU. So, it is clear that G-14 may claim a central position in the Social Dialogue next to an organisation like EPFL. The Social Dialogue in principle is open for any organisation without the participation of which the process would be defective and incomplete and without the participation of which deals made between social partners in fact would be meaningless.

See further in this context: the position of player's agents and national employers unions such as the Federatie Betaald Voetbal Organisaties (FBO) in the Netherlands and the Union des Clubs de Football Professionnel (UCPF) in France.

Another important aspect is to identify the scope of the Social Dialogue in the European Union. There are many clubs that do not use employment contracts but are employers in practice. Especially in amateur football the football players run the risk of having bad working conditions and the employers run the risk of acting in breach of social security and tax institutions.

In order to appoint the right parties the European Commission has ordered an objective study in the 25 member states to examine the structure of the employment sector in football.

European Sports Model

Q. Is the pyramid structure of professional sport (football) in Europe in conformity with EU law?

A. The existing (pyramid) structure of professional sport (football) in Europe and the world at large is contrary to the basics of the EU internal market, as far as it is based on the principle of territorial nationality and does not allow for alternative competitions (cf., the United States model). Break-away leagues are forbidden and players in such leagues would not be allowed to play for their national team anymore. Under European competition law however clubs have the freedom to form cross-boundary leagues themselves as they would think fit. The pure application of European competition law to professional football would lead to a situation in which the rich clubs become even richer and the poor clubs even poorer, it is often argued. So, solidarity should be organised through national associations, UEFA and FIFA. However, in practice the present horizontal and vertical ("grass roots") solidarity of and between clubs is not of such an extent that the European Commission would easily grant exemptions from competition law for that reason. Striving for competitive balance is not a real point of policy in national premier leagues nor on the international, European (UEFA) level. The traditional method of balancing leagues is in fact the promotion/relegation system as part of the pyramid structure. On the European level we see nowadays the division between Champions League and the UEFA Cup competition as a result of balancing, whereas in the past all national champions participated in the European Cup (I), all cup winners in another European Cup Competition (II) and runners up in a third one. The present situation is reflected by the existence of the G-14 (G18) (regular Champions League clubs) and the European Club Forum of more than hundred runners up (regular UEFA Cup participants, in fact also including also G-14). A third category of clubs has to qualify for those competitions in preliminary rounds. The professional football world itself should decide whether they wish to introduce really far-reaching solidarity mechanisms (cf. the United States model, the practice of which is not similar to the theory) and ask for exemptions, for example for the purpose of the collective selling of tv rights and the distribution of that income for the benefit of the poorer clubs to the detriment of the richer ones. If not and it seems totally unlikely that it will happen, the current trend will continue to develop. However, a better solution than the creation of trans-boundary break-away leagues in this context is the adaptation of UEFA law and policy in order that such leagues would become part of the current structure. A joint BeNe-League (Belgium and The Netherlands) would be a modest example. Alternatively, individual clubs should be allowed to join larger competitions (Celtic, Glasgow Rangers into the English Premier League). The basis of all such moves would of course be the common consent of the clubs concerned. Under European competition law no club can be forced to

play another one without its consent of course, it seems. (Is this also true from a market perspective: what if for example PSV Eindhoven wants to play in the German Bundesliga in order to enter a larger market with much better chances to generate more money and so to become much better equipped to compete with the elite clubs in Europe on the international transfer market? The problem is that a club may only enter a market by playing other clubs; the football product is a match/competition between competitors! Is “consent” a sporting rule or may it be set aside by European competition law?! Now all Leagues are based on “consent” through the FA’s and UEFA, but what is the status of this basic sporting principle in a competition law perspective? Shouldn’t the market principle prevail? And do all clubs really, not only in a formal sense - via association law lines - have consented? If a club does not agree, it literally is out of the game. Generally speaking, in professional football, as consequence of the “one club one vote” democratic principle a small minority of clubs has to accept the decisions taken by the vast majority of clubs.). Under current UEFA rules there is no level playing field for clubs internationally, since a club from a smaller country has to generate much of his income in a smaller national market than a club in a larger country, whereas they have to pay the same price for a player. The principle of territorial nationality in professional football in Europe is contrary to the idea of the Common Market and also to the very idea of competitive balance.

In this context, the Euroleague in basketball is an interesting example of how competition structures may be successfully adapted in the context of an international sports federation (FIBA). The Euroleague was in fact constituted as a break-away league of elite clubs, but backed by their national associations. Finally, it was incorporated in FIBA, but having an independent position towards FIBA in all matters, at the same time being part of FIBA as an “umbrella” organisation. The Euroleague negotiates with FIBA about the services (referees etc.) it needs to function properly.

Scrutinizing the FIFA rules governing the release of players by clubs for international matches, Stephen Weatherill, Jacques Delors Professor of EC Law, Oxford University, United Kingdom, states in a forthcoming article (The International Sports Law Journal (ISLJ) 2005/3-4) that the reform of these rules in favour of the clubs delivering the players would be instrumental not in demolishing the pyramid according to which football is regulated but instead in confirming the pyramid’s scope of application to matters which are necessarily required for the organization of the game...”. “It is crucial that as a matter of EC law the international federations do not have autonomy to decide for themselves what is the nature of the sport and the rules necessary to protect and promote it.”, he continues. Finally, he makes the case that the pyramid is currently too big – that too many decisions with direct and substantial commercial implications are taken by sports federations who disallow input from the clubs who are intimately affected by those decisions.” And these clubs are if not commercial, profit-oriented enterprises, so at least economic entities in Europe nowadays.

The recommendation to the European Parliament would be to urge UEFA and FIFA to anyhow change their policy in this respect and bring their Statutes, Rules and Regulations in conformity with the basic principles of European competition law.

As a further step, we would even suggest to involve the European Commission in this basic issue of the structure of European professional sports (football) in a more active role. Of course, individual clubs or groupings of clubs could finally go to the European Court of Justice to liberate the market and, in particular, for example to change “the football law” (cf., the current actions by G-14 before the Competition Commission of Switzerland and joining FC Sporting Charleroi v. FIFA, arguing that the mandatory player release system is unlawful), but this approach will not structurally change circumstances in European professional football. To really open the market more is necessary. So, it should be considered whether using the instrument of a Commission Directive for the liberalization of the professional football sector in particular, is not a useful instrument to pave the way for changes in case individual clubs or groupings of clubs wish them to happen on the basis of the principles of fair competition under European Law. In such a Directive special attention should be also paid to the crucial competition issue of state aid. It is not yet clear what is legally allowed or not under the EC Treaty. Neither the European Commission nor the European Court of Justice has so far decided on any concrete case in professional sport (football). In the perspective of guaranteeing a level playing field amongst clubs on the European level, it is of utmost importance that the Commission presents its policy on this issue explicitly, also thereby creating legal certainty for all parties involved. In this context, it is to be welcomed that UEFA will adopt in the near future a European licensing system for clubs. The licensing system will help to promote a level playing field between clubs on a European level. It is

not only contrary to fair competition that some clubs get financial and other support from public authorities (state aid) and others not, but is also very detrimental to fairness that some clubs are allowed to have economic budgetary deficits in their home country, whereas others abroad are not allowed to. Another issue that is open for debate in the context of the market perspective of the European professional football sector, for example, is the UEFA “coefficients table” for the determination of the participation of the actual number of clubs per country in the Champions League and UEFA Cup each season under European competition law. It implies that clubs are dependent on the performance of other clubs of the same country which they cannot influence. And there is also the UEFA rule that winners and runners-up in the Champions League from larger countries receive more premium money than those from smaller countries, because they represent a much bigger football TV market and consequently generate much more income.